

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

IN THE MATTER OF:

Gary Development Co., Inc.)

Respondent )

) Docket #RCRA-V-W-86-R-45

\*\*\*\*\*

| VOLUME I |

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BE IT REMEMBERED that heretofore, pursuant to agreement as to time and place and pursuant to Federal guidelines, the above-referenced cause came on for Trial before the HONORABLE J. F. GREENE, Administrator, U. S. Environmental Protection Agency, and reported by Vivian E. Jarrett, CSR, RPR-CP, a duly competent and qualified court reporter and Notary Public in the County of Lake, State of Indiana, on the 9th day of September, 1987, commencing at the hour of 11:15 a.m.

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| VOLUME I |

| Pages 1 - 250 |

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E X H I B I T S

VOLUME I

EXHIBIT	STATUS	PAGE
Complainant's Exhibit No. 1	Admitted	183
Complainant's Exhibit No. 4	Admitted	212
Complainant's Exhibit No. 8	Admitted	67
Complainant's Exhibit No. 9	Admitted	96
Complainant's Exhibit No. 11	Admitted	74
Complainant's Exhibit No. 14	Admitted	173

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A P P E A R A N C E S :

HONORABLE J. F. GREENE  
Administrative Law Judge

Presiding Judge;

ATTORNEY MARC M. RADELL  
ATTORNEY ROGER M. GRIMES  
U.S. Environmental Protection Agency  
Region V  
230 South Dearborn Street  
Chicago, Illinois 60604

on behalf of U.S. EPA;

ATTORNEY WARREN D. KREBS  
PARR, RICHEY, OBREMSKEY & MORTON  
121 Monument Circle - Suite 503-507  
Indianapolis, Indiana 46204

on behalf of Gary Development Co.

\* \* \* \*

THE COURT: On the record. This is  
the matter of Gary Development Company,  
Incorporated, Docket Number V-W-86-R-45. I'd  
like a statement of appearances, please, from  
counsel, starting with the Government.

MR. RADELL: My name is Marc M.  
Radell. I'm counsel for the U.S. Government  
Environmental Protection Agency.

MR. GRIMES: My name is Roger Grimes,  
G-R-I-M-E-S, also counsel for the Government.

THE COURT: For the respondent?

1 MR. KREBS: For the Respondent, Your  
2 Honor, Warren Krebs from the law firm of Par,  
3 Richey, Obrebskey and Morton, 121 Monument  
4 Circle, Suite 500, Indianapolis, Indiana. And  
5 I'd also like to advise the Court that with me  
6 today, sitting at the table, is Larry Hagen,  
7 who is the Vice President of the Respondent  
8 Gary Development; and also in the courtroom  
9 today with me is Dr. Terry West, who is a  
10 geological consultant for Respondent Gary  
11 Development.

12 THE COURT: It's been sometime since  
13 this complaint was issued and since we had  
14 pre-trial exchange. I'd like a brief statement  
15 from each of the parties, setting forth what  
16 the relative positions are at this moment,  
17 whether there are stipulations or other such  
18 matters. Mr. Radell.

19 MR. RADELL: Yes, Your Honor. The  
20 parties were unable to enter into stipulations.  
21 U.S. EPA proposed such stipulations, pursuant  
22 to your pre-hearing exchange order; but  
23 respondent declined to enter into any.

24 I have a brief opening statement prepared,

1           which I would like -- which sets forth the  
2           facts to which EPA stipulates and the facts  
3           which respondent admitted in its complaint and  
4           how EPA views the remaining issues and how we  
5           intend to prove them.

6                     Shall I proceed with that statement?

7                     THE COURT: Well, yes, go ahead.

8                     MR. RADELL: Thank you. As you know,  
9           this case concerns allegations of violations of  
10          the Resource Conservation and Recovery Act,  
11          which were referred to as RCRA.

12                    The EPA in its complaint alleges that Gary  
13          Development Company has accepted for treatment  
14          and disposal certain hazardous waste and does  
15          not have a permit or other operating status to  
16          dispose and treat these wastes; and therefore  
17          must close its facility, in compliance with the  
18          RCRA regulations and pay a penalty of  
19          \$117,000.00.

20                    In its answer to our complaint, Gary  
21          Development Company admitted that it conducts a  
22          sanitary landfill for the disposal of municipal  
23          and commercial refuse. EPA will prove today  
24          that Gary Development Company accepted

1 hazardous waste for disposal, after the date of  
2 May 19th, 1980, which means that it is subject  
3 to regulations by RCRA.

4 The complaint alleges that Gary  
5 Development Company accepted four different  
6 hazardous waste from three generators. The  
7 first of those wastes is listed Hazardous Waste  
8 Number F006, which is waste water treatment  
9 sludge from electroplating operations, listed  
10 for its characteristics of toxicity in the  
11 Indiana Administrative Code. This waste was  
12 generated by Jones and Laughlin Steel, Indiana  
13 Harbor Works, in East Chicago.

14 EPA stipulates at this time to withdraw  
15 all of all allegations in the complaint  
16 concerning Hazardous Waste Number F006, since  
17 it has come to EPA's attention that such waste  
18 was the subject of a temporary delisting order  
19 from headquarters during all relevant times of  
20 the alleged actions, and therefore is not  
21 subject to regulations.

22 The second waste which is referred to in  
23 the complaint is Hazardous Waste K087, decanter  
24 tar sludge. That is also listed for its

1 characteristics of toxicity in the Indiana  
2 Administrative Code and was also generated by  
3 Jones and Laughlin Steel.

4 Gary Development Company in its answer  
5 neither admits nor denies accepting and  
6 disposing of K087. EPA will prove that they  
7 accepted almost 300 million gallons of K087,  
8 between November of 1980 and March of 1982. We  
9 will do this by introducing manifest for those  
10 wastes, the generators and/or report of Jones  
11 and Laughlin Steel, by the testimony of  
12 Mr. Cooper and Mr. Warner.

13 The third waste which is the subject of  
14 the complaint is Hazardous Waste Number F005,  
15 paint sludge, which is listed for its  
16 characteristics of ignitability and toxicity.  
17 It is also listed in the Indiana Administrative  
18 Code. It was generated by American Chemical  
19 Services, Incorporated, which is a treatment  
20 storage disposal recycling facility in  
21 Griffith, Indiana.

22 In its answer, Gary Development Company  
23 admits that it accepted 33 shipments of paint  
24 sludge waste from American Chemical Services,



1           between January, 1981, and November of 1981.  
2           Gary claims that the waste was not listed as  
3           hazardous waste, but was merely characteristic  
4           by ignitability and that Gary treated such  
5           waste prior to disposal to remove ignitability.

6           EPA intends to prove that Gary Development  
7           Company accepted 37 shipments, which is over  
8           120,000 gallons of such waste, between December  
9           of 1980 and November of 1981; that this waste  
10          is in fact F005, the listed waste, and not  
11          D001, the waste by characteristics of  
12          ignitability. We shall do this by introducing  
13          manifest and generator's annual report and the  
14          testimony of Mistfers Cooper and Warner.

15          We shall also admit that the treatment  
16          of -- excuse me -- we shall also prove that the  
17          treatment of such waste, to which Gary  
18          Development admits is in itself subject to RCRA  
19          regulations, that they should have gotten a  
20          permit for that.

21          The last waste which is a subject of the  
22          complaint is Hazardous Waste D008, which is  
23          waste that is characteristic for its EP  
24          toxicity contents in lead.

1           There are three such waste which  
2           constitute the D008; one is calcium sulfate  
3           sludge, which is neutralized battery acids; the  
4           second is rubber battery chips; and the third  
5           is reverb slag. These wastes were generated by  
6           U. S. S. Lead Refinery, Incorporated in East  
7           Chicago.

8           In its answer, Gary Development Company  
9           admits that Vice President Larry Hagen advised  
10          the Indiana State Board of Health that Gary  
11          accepted the calcium sulfate sludge and the  
12          battery chips, but claims that neither were  
13          hazardous.

14          EPA shall prove that they accepted over  
15          six -- excuse me -- over 760,000 gallons of  
16          calcium sulfate sludge, approximately 900 cubic  
17          yards of rubber battery chips, and over 200  
18          cubic yards of reverb slag, between November  
19          20th, 1980, and January of 1983; and that all  
20          of these wastes constitute hazardous waste  
21          D008, characteristic for its EP toxicity of  
22          lead. We shall do this by the testimony of  
23          Misters Cooper and Warner and introduce  
24          shipping manifests and waste analyses from

1 U. S. S. Lead.

2 Having proved that Gary Development  
3 Company is indeed subject to regulation by  
4 having accepted these wastes, EPA shall prove  
5 the other violations alleged in the complaint;  
6 namely, that Gary did not submit hazardous  
7 waste notification by August 18th, 1980. In  
8 its answer, Gary claims to be without knowledge  
9 as to this.

10 We shall also show that Gary did not  
11 submit a Part B hazardous waste application or  
12 the certification of groundwater monitoring and  
13 financial assurance requirements by November  
14 8th, 1985. Indeed, we shall not have to prove  
15 these counts, since in its answer Gary admits  
16 that it did not submit a Part B for the  
17 certification. However, it denies that it was  
18 operating without interim status. We shall  
19 demonstrate our part of these claims through  
20 the testimony of John Cooper, who has reviewed  
21 the official files of EPA.

22 As for the interim status standard  
23 violations, which were observed in the  
24 inspections that are alleged in the complaint,

1 Gary Development Company denies those  
2 violations in its answer. EPA shall prove them  
3 today, through the testimony of Mr. Warner and  
4 the admission of inspection reports and related  
5 documents. Thus, EPA must prove only that Gary  
6 Development Company accepted hazardous waste,  
7 to demonstrate that Gary Development Company  
8 operated without a permit or interim status,  
9 since Gary Development Company admits that it  
10 did not submit a Part B or the necessary  
11 certifications that are prerequisite to  
12 operations. Therefore, Gary Development  
13 Company must close.

14 Finally, to support the proposed penalty  
15 of \$117,000.00, EPA shall demonstrate the  
16 violations observed and the inspections, plus  
17 the fact that Gary was operating without  
18 interim status; and the potential harm that  
19 these violations may cause to the environment  
20 and to human health, due to the characteristics  
21 of the waste themselves and to the lack of  
22 sufficient groundwater monitoring or lack of  
23 the sufficient liner to protect the environment  
24 and human health. We shall demonstrate how

1 this penalty was calculated, in compliance with  
2 the RCRA Civil Penalty Policy, and we shall do  
3 that through the testimony of Mr. Cooper.

4 That's all.

5 THE COURT: Mr. Krebs.

6 MR. KREBS: Your Honor, on behalf of  
7 the Respondent, in our opening statement we  
8 would like to point out, as has been stated by  
9 opposing counsel, that this case involves a  
10 complaint filed by U. S. EPA against the  
11 Respondent and indicating it was -- it's filed  
12 pursuant to Indiana law, that it says issued  
13 the complaint; and the EPA is seeking an order  
14 of this agency, the Federal agency, that Gary  
15 Development should comply with Indiana law,  
16 especially regarding groundwater monitoring and  
17 closure and post-closure.

18 The basis of this situation is that, I  
19 guess number one, Gary Development filed in  
20 November of 1980 a Part A RCRA application with  
21 U. S. EPA. The evidence will show that,  
22 indeed, U. S. EPA determined that Gary  
23 Development did not have interim status, even  
24 though it had filed a Part A application. And

1 as the Judge is probably aware, normally  
2 interim status has been interpreted -- has been  
3 interpreted by the agency to really be a fairly  
4 automatic type of status, not really a permit  
5 situation, where the agency grants a permit,  
6 but an automatic status.

7 In this case, unlike any that I've  
8 previously dealt with, the Agency, the Federal  
9 Government, took the position early on -- as  
10 early as 1982, if not before, the evidence will  
11 show -- that this facility never had interim  
12 status. Nevertheless, as it is alleged in the  
13 complaint, EPA redevise, sent Gary a notice to  
14 submit a Part B application. I think that's a  
15 rather unique situation also, that a site which  
16 EPA considered never had interim status would  
17 then be required to file a Part A application,  
18 when its interim status -- under a Part B  
19 application, when its interim status under Part  
20 A had never been accepted and recognized by the  
21 same agency.

22 The allegations as to why this facility  
23 should be considered a RCRA facility are  
24 really, as summarized I think fairly accurately

1 by opposing counsel, that allegedly the  
2 facility took what is now called RCRA waste,  
3 some types of RCRA waste, in approximately the  
4 one year after RCRA became effective and after  
5 the permit application for Part A permit had  
6 been filed by the facility in November, 1980.  
7 We are contesting that. We believe that either  
8 of the waste that were accepted, number one,  
9 were not RCRA waste. One I believe they've  
10 stated -- and correct me if I'm wrong on that,  
11 that they are withdrawing their contention on  
12 that -- that it was a waste that was delisted  
13 by U. S. EPA, even though it is set forth in  
14 the complaint as being a RCRA waste. And we  
15 believe that the other waste either were not  
16 RCRA waste, were mismanifested by the  
17 companies, or that they just weren't RCRA waste  
18 to begin with; or, secondly, they didn't come  
19 to this facility.

20 We believe that the Government is  
21 attempting to prove waste came to this  
22 facility, which the manifest indicate on their  
23 face were never accepted by the facility. The  
24 manifest that we've been provided by the

1 Government in the pre-trial documents indicate  
2 no signature of acceptance by Gary Development.  
3 They are merely documents where a company says  
4 that they are going to ship waste to a  
5 particular facility for disposal. But as the  
6 Judge I'm sure is aware, that the manifest  
7 system for tracking contemplates a three-tier  
8 step; that is, the company puts on there where  
9 they are going to send, their waste; the  
10 transporter is listed; and then there is an  
11 acknowledgment required as to where the waste  
12 was actually disposed of. The documents we  
13 were sent, did not show acknowledgment by my  
14 client that that waste was received in our  
15 facility. We're going to strenuously object to  
16 those documents coming into evidence, because  
17 of that problem.

18 That, basically, is the summary as to --  
19 in general, as to why the Government believes  
20 that this site should be regulated under RCRA.  
21 The facts are that this site was approved by  
22 the State of Indiana, the predecessor to the  
23 present Solid Waste Management Board, which is  
24 in the Department of Environmental Management,



1 which are the present two state agencies that  
2 regulate this facility. Their predecessors  
3 specifically approved the construction of this  
4 site in 1974. That specific date, by the way,  
5 which will be discussed in the evidence, was  
6 June 19th -- I'm sorry, June 19th, 1973 -- I  
7 apologize; my years were confused -- 1973, June  
8 19th, was when the facility was granted a  
9 construction permit to be where it's located.

10 Now, secondly, the State allowed the site  
11 actually to go into operation in 1974, in  
12 August, 1974.

13 Thirdly, previously, there -- the State  
14 required in a state administrative matter that  
15 Gary Development in 1980 submit a revised  
16 construction plan to build the site or  
17 construct the site in a manner different than  
18 the State had approved in 1973, okay, by the  
19 state permit; and Gary did that. And in 1980,  
20 specifically on November 14th, 1980, Gary  
21 Development submitted to the state agency at  
22 that time -- it is now, I believe, called the  
23 Indiana Environmental Management Board -- an  
24 application for a modification or amendment to

1 its construction plan on how the facility was  
2 going to proceed in future construction. That  
3 plan was approved by the Indiana Environmental  
4 Management Board on February 16th of 1982. On  
5 that date, the Environmental Management Board  
6 not only approved the new construction design  
7 for this facility, but also approved a new  
8 operating permit for this facility; renewed, if  
9 you will, the operating permit on the same  
10 date.

11 In connection with that, however, there  
12 were nine conditions that the State of Indiana,  
13 the Agency responsible in this area in the  
14 State of Indiana for regulations, placed upon  
15 this facility as to how it would operate and  
16 how it would be constructed. Let's refer to  
17 conditions as to items which the Agency felt  
18 the site should do, that weren't set forth in  
19 its application on how it was going to operate.

20 Gary appealed those nine conditions that  
21 the State of Indiana established in 1982 as to  
22 how this facility would operate. And in  
23 connection with that, there was entered into  
24 between the Respondent Gary Development and the

1 Indiana Environmental Management Board, who EPA  
2 now says that they're bringing this action on  
3 behalf of, there was an agreement entered into,  
4 which was approved by the full Indiana  
5 Environmental Management Board on February  
6 18th, 1983. I have with me today, Your Honor,  
7 a certified copy of that particular decision of  
8 the Indiana Environmental Management Board.

9 Now, we have contended in our first  
10 response in our answer --

11 MR. RADELL: Your Honor, this was not  
12 mentioned, this entire train of argument was  
13 not mentioned in Gary Development Company's  
14 pre-hearing exchange.

15 THE COURT: Well, that's true; but I  
16 must hear the opening statements from counsel,  
17 Mr. Radell. And if you wish to be heard, I'll  
18 give you an opportunity.

19 MR. KREBS: I'm just going to sit this  
20 here. I'm not asking the Court to -- or the  
21 Judge to read it at the present time, if the  
22 court chooses not to, just so that it's there.  
23 (Tendered.)

24 We did raise in our written answer that

1       this agency has no jurisdiction to hear this  
2       case. It has no jurisdiction over the  
3       Respondent Gary Development on the matters that  
4       have been raised, that's specifically in our  
5       answer, filed timely with the Agency.

6               The main crux of that -- there are two  
7       portions of the jurisdictional issue, there are  
8       two portions to that issue. The first is that  
9       this Agency in the case that I was involved  
10      in -- and I also have a copy of that decision  
11      here -- is a copy of the decision that was  
12      issued by EPA Administrator Lee in Northside  
13      Sanitary Landfill, RCRA Appeal Number 84-4,  
14      which is the decision which was binding upon  
15      this Agency, written by the Chief  
16      Administrator. In this decision, which was  
17      assigned by the Administrator on November 27th,  
18      1985, the Administrator held that in matters  
19      where there is the dual roles of the state  
20      agency -- and I have a copy of that, it's  
21      merely a copy of the decision that was sent to  
22      me by the Administrator -- The Administrator  
23      specifically held that in these matters, that  
24      if the State is authorized under Phase I, that

1           it is the role of the state to pursue closure  
2           matters and it is not the role of U. S. EPA. I  
3           would like to quote specifically from this  
4           decision. On page four, Administrator Lee  
5           holds, Indiana had been granted the authority  
6           to make closure determination pursuant to  
7           section 3006 of RCRA, a fact that was not  
8           brought to light in the parties' original  
9           submissions. Sections 3006(b) and (c) provide  
10          that when a qualified state receives  
11          authorization, the federal program is suspended  
12          and the hazardous waste program operates under  
13          state law. In this instance, Indiana received  
14          a so-called Phase I authorization on August  
15          18th, 1982, which gave the State the necessary  
16          authority to approve the closure plan of any  
17          facility whose permit application has been  
18          denied by EPA. Under a Phase I authorization,  
19          EPA retains the authority to issue permits,  
20          period -- that is not the issue in this case --  
21          and, therefore, was the proper authority to  
22          issue the permit denial. Again, that is not an  
23          issue in this case. This is not a situation  
24          where there is a permit denial.

1           However, the Administrator goes on to  
2 hold, because the Phase I authorization --  
3 because of the Phase I authorization, EPA was  
4 not the proper authority to decide which areas  
5 the facility should close; Indiana was.

6           The Administrator goes on to hold at the  
7 bottom of page 6 of his decision, Indiana, not  
8 EPA, has the authority to approve Petitioner's  
9 closure plan, including the responsibility to  
10 decide which areas of the facility have to  
11 comply with specific closure requirements such  
12 as the requirement for a final cover, because  
13 state law will supersede -- has superseded the  
14 federal closure requirements, 40 CFR 265  
15 (Subpart G), the closure proceedings will take  
16 place under the procedures established by the  
17 Indiana regulations, corresponding to the  
18 federal requirements; and the closure plan must  
19 comply with the standard set out in Indiana  
20 law. Petitioner will therefore have the  
21 opportunity to present its argument to the  
22 state. The Region's statement that the Old  
23 Farm -- which is an area in the Northside case,  
24 specifically -- must close, cannot be viewed as

1 a final action imposing closure obligations on  
2 Petitioner, for the statement is without legal  
3 effect, as previously stated.

4 Granting Petitioner an additional hearing  
5 in a federal administrative forum would not  
6 only call the state's authority into question,  
7 by requiring EPA to decide a state law matter,  
8 but would also undoubtedly duplicate the  
9 efforts of state officials. Inasmuch as  
10 Petitioner has not challenged its permit  
11 denial, but wishes only to be heard on the  
12 issue of its closure obligations, no purpose  
13 would be served by the submission of such  
14 evidence in a federal rather than a state  
15 proceeding. The state administrative agency  
16 therefore provides the proper forum for  
17 resolving questions about Petitioner's closure  
18 obligations.

19 In this case, Your Honor, I argued to the  
20 EPA Administrator on behalf of Northside  
21 Sanitary Landfill that we, Northside Landfill,  
22 was entitled to a hearing before EPA as to  
23 whether it should close and what portions of  
24 its facilities were required to close,

1           precisely the same issue that's involved in  
2           this case. In this case the Government is  
3           asking that you order this facility to close  
4           under RCRA; and the proceedings to determine  
5           whether it should close, to be made by this  
6           Agency. I argued that that was the law to the  
7           Administrator, unsuccessfully. The  
8           Administrator held that this is entirely a  
9           matter of state law in the Northside case, even  
10          to the point of reversing its prior decision  
11          which he had made six months previously,  
12          reversing himself and holding that the  
13          Government -- the Federal Government had no  
14          authority even to determine what portions of  
15          the site should close.

16                 In this case the Government is arguing the  
17                 opposite. They want this Judge to order this  
18                 facility, the 62 acres to close, precisely the  
19                 same issue that was involved in the Northside  
20                 case, which the Administrator held that this  
21                 Agency no longer has the jurisdiction to  
22                 consider.

23                 The decision in the Northside case was  
24                 appealed to the U.S. 7th Circuit Court of



1 Appeals. I argued that case; I lost. The U.S.  
2 7th Circuit Court of Appeals in a decision, of  
3 which I also have a copy of the slip opinion of  
4 the court with me -- I don't have the Federal  
5 2d cite handy, but I can get it for the Court,  
6 if it desires -- but this case was Northside  
7 Sanitary Landfill versus Lee M. Thomas, who  
8 issued the decision I just quoted from. And in  
9 that case issued by the U.S. 7th Circuit Court  
10 of Appeals in Chicago, on December -- I'm  
11 sorry, on October 23rd of 1986, the three-judge  
12 panel unanimously upheld the decision in this  
13 situation.

14 We appealed that we were denied due  
15 process, did not have the opportunity for a  
16 hearing before EPA, an evidentiary hearing like  
17 we're going to have in this case at this point;  
18 and we lost. That's what the law in this  
19 country is and it asserted that the  
20 Administrator is right when he held that  
21 closure procedure -- not just the technicality  
22 of closure as to how many wells you might put  
23 in or what type of cover you may use, whether  
24 it's going to be synthetic, all those

1 details -- not just the details were a matter  
2 to be determined under state law, but the  
3 actual closure proceedings themselves; and, in  
4 fact, actually if the site and what portions of  
5 the site need to close under RCRA are a matter  
6 of state law that must be decided by the State  
7 of Indiana, and the EPA is precluded from  
8 making those determinations.

9 And now I have in this case the absolute  
10 opposite, 180 degree opposite position taken by  
11 Region V, from what the Administrator ruled in  
12 the Northside case in precisely the same issue.  
13 So that is one prong of our argument that,  
14 respectfully submitted, that this Judge, this  
15 Agency has no jurisdiction to rule upon all  
16 these things that they've asked you to rule  
17 upon.

18 If you look at what's requested in their  
19 relief, they don't even ask it to be a simple  
20 determination as to whether the site is subject  
21 to RCRA closure or not. They say they want  
22 this site ordered to put in so many monitoring  
23 wells, and they go through specifics on how  
24 they want those wells designed, specifically;

1 and they're asking this court or this Agency to  
2 make those decisions. They're asking that a  
3 groundwater plan, an assessment be submitted  
4 within a certain period of time. And the  
5 things here don't say just submit it to the  
6 State; they request these things be submitted  
7 to EPA, also. And, yet, EPA has given up the  
8 jurisdiction in this area by their own  
9 argument, argued by the Justice Department on  
10 their behalf before a Federal U. S. Court. And  
11 now, before this Agency, they want to argue  
12 that they can have their cake and eat it, too.  
13 And when the shoe is on the other foot and for  
14 a particular reason they decide they want to  
15 hold a hearing, then suddenly they now have  
16 jurisdiction and suddenly they can now have a  
17 court of the law and to put into evidence to  
18 determine what the State of Indiana in another  
19 case they felt was the exclusive body to make  
20 the decision on it.

21 The second prong of our case in jurisdic-  
22 tion is that this matter in its entirety is  
23 banned also by res judicata and collateral  
24 estoppel, which absolutely applies in these

1 federal proceedings; and I've sat up there for  
2 consideration the decision which I mentioned  
3 previously of the Indiana Environmental  
4 Management Board, signed, it's a certified  
5 copy. It's signed by the Attorney General's  
6 Office on behalf of the State of Indiana; it's  
7 signed by the hearing officer appointed by the  
8 Indiana Environmental Management Board; its  
9 signed by at that time the top executive of  
10 what was then the environmental agency in the  
11 State of Indiana, after it was approved by the  
12 full agency. And in that decision issued in  
13 February of '83, the manner in which this site  
14 is going to operate, its construction, items  
15 such as cover, leachate collection system, clay  
16 barriers, monitoring wells, many of the issues  
17 that the Federal agency is now attempting to  
18 address in this case on behalf of the State of  
19 Indiana have been determined, specifically.

20 Now, I would like to, in connection with  
21 this phase of the argument, provide to the  
22 Judge -- by courtesy of the court library here  
23 in Gary, Indiana -- a case by the United States  
24 Supreme Court, 1981, Federated Department

1 Stores. This case addresses precisely this  
2 type of issue. This case was decided with only  
3 one dissenting opinion. The opinion was issued  
4 by Judge Renquist, not as Chief Justice, but  
5 who of course is Chief Justice now. There was  
6 only one dissenting opinion by the Supreme  
7 Court to this decision, and that dissenting  
8 opinion was by Justice Brennan. All the other  
9 Judges either concurred in the opinion or wrote  
10 a concurring opinion.

11 And this case -- and I'm citing  
12 specifically from the U. S. Court Cite 398, at  
13 401 -- Justice Renquist held, and I quote,  
14 there is little to be added to the doctrine of  
15 res judicata as developed in the case law of  
16 this court. A final judgment on the merits of  
17 an action precludes the parties or their  
18 privies -- which EPA is saying they are here on  
19 behalf of the State of Indiana to enforce state  
20 law -- or their privies from relitigating  
21 issues that were or could have been -- his  
22 words were or could have been -- raised in that  
23 action. Nor are the res judicata consequences  
24 of a final, unappealed judgment on the merits

1 altered by the fact that the judgment may have  
2 been wrong or rested on a legal principle  
3 subsequently overruled in another case. The  
4 doctrine of res judicata serves vital public  
5 interests beyond any individual judge's ad hoc  
6 determination of the equities in a particular  
7 case. There is simply, "no principle of law or  
8 equity which sanctions the rejection by a  
9 federal court of the salutary principle of res  
10 judicata." The Court of Appeals' reliance on  
11 public policy is similarly misplaced. This  
12 court has long recognized that "public policy  
13 dictates that there be an end to litigation;  
14 that those who have contested an issue, shall  
15 be bound by the results of the contest; and  
16 that matters once tried, shall be considered  
17 forever settled as between the parties." We  
18 have stressed that "the doctrine of res  
19 judicata is not a mere matter of practice or  
20 procedure inherited from a more technical time  
21 than ours. It is a rule of fundamental and  
22 substantial justice, of public policy and of  
23 private peace, which should be cordially  
24 regarded and enforced by the courts."

1           What we have here is in February, 1983, a  
2           settlement agreement and a consent order was  
3           entered into between the state agency -- which  
4           is in privity with EPA in this case -- and my  
5           client and approved by the Attorney General,  
6           the highest legal official in the State of  
7           Indiana.

8           Under Indiana law, and I will cite to you  
9           specifically the case -- I do not have a copy  
10          of that right with me -- in 1985 it was  
11          determined by the Indiana Court of Appeals in a  
12          case of Elder v. State of Indiana, that's  
13          E-L-D-E-R, Ex Rel Department of Natural  
14          Resources. The Department of Natural Resources  
15          is what I call a sister agency to the  
16          Environmental Agency in the State of Indiana.  
17          In that case, which was decided in October,  
18          1985, it was determined that consent decrees  
19          are the same and have the full force in Indiana  
20          as do final judgments of the court, as long as  
21          they are approved by the full agency. And so  
22          the decision was in Indiana that if you have a  
23          consent decree, an agreed upon order, approved  
24          by agency and a party, that is just like having

1 a judicial decision.

2 And then if you look at the Federated  
3 Department Stores case, we have res judicata,  
4 not only on the specific issues determined in  
5 the order which I have provided to the hearing  
6 officer -- to the Judge here, but also on any  
7 matters that could have been raised. It's  
8 absolutely what both the Indiana courts hold,  
9 Indiana Court of Appeals and the Supreme Court  
10 and the Supreme Court of the United States.  
11 Any matter that could have been raised is res  
12 judicata, and they had to have raised it in  
13 that state proceeding at that time.

14 Your Honor, everything that they are  
15 contending here predated the decision which is  
16 sitting in front of you now from this Agency,  
17 who the Federal Government is now arguing they  
18 are here on their behalf. They are arguing  
19 that matters have occurred in 1980 and 1981.  
20 This decision was issued in February --  
21 February 18th, 1983, a year and a half to two  
22 years later. And it certainly is res judicata  
23 on all the issues that were raised, such as how  
24 the sites were to be operated, the manner of



1 coverage, etc., monitoring wells, but also on  
2 issues that could have been raised. In that  
3 decision, it even addresses one of the specific  
4 waste which is in their complaint here, the  
5 waste of Jones and Laughlin. It's specifically  
6 addressed in that case. And now we're going to  
7 relitigate that same waste here, because  
8 they've decided they've changed their mind, I  
9 guess, or the Federal Government is changing  
10 the State's mind on behalf of the State. The  
11 State is absent from this hearing. If this was  
12 such an important case for the State, number  
13 one, they could have brought it themselves,  
14 which they have not done and chosen evidently  
15 not to do. And, secondly, they should be here  
16 as a party in this case and representing  
17 themselves, if they have changed their mind and  
18 believe that this decision is not binding upon  
19 them and the Federal Government.

20 I would also like to cite specifically to  
21 the court regarding the issues of res judicata  
22 two other U.S. Supreme Court cases, which I  
23 will not belabor to cite specifically as far as  
24 the language in it. But in both Parklane,

1        P-A-R-K-L-A-N-E, Hosiery Company versus Shore,  
2        S-H-O-E-R, 439 U. S. 322, specifically between  
3        pages 326 and 333; and also in the decision of  
4        Blonder, B-L-O-N-D-E-R, and Tongue,  
5        T-O-N-G-U-E, Laboratories versus University of  
6        Illinois Foundation, found at 402 U. S. 313,  
7        specifically at page 334, the Supreme Court of  
8        the United States also held that offensive  
9        estoppel and collateral estoppel -- which as  
10       the Judge knows are related to res judicata --  
11       may be asserted by a party, even if he was not  
12       a party in the other cases. We can assert  
13       those under federal law in this case. That  
14       shows the Court or the Judge how extensive res  
15       judicata is interpreted under federal law,  
16       which is binding upon this Agency.

17                That even if Gary Development was not a  
18       party to that decision which I have laid in  
19       front of the Judge by the Indiana Environmental  
20       Management Board in February of 1983, we could  
21       still raise in this proceeding as offensive  
22       estoppel or collateral estoppel any matters  
23       that have been determined that involve this,  
24       even though we weren't a party. In this case

1 we were specifically a party, the State of  
2 Indiana was a party. There is no question and  
3 it's admitted in the complaint that there's  
4 absolute privity between the Federal  
5 Government, who is bringing this action here,  
6 and the State of Indiana.

7 On those two basis, we specifically in our  
8 answer objected to the jurisdiction of this  
9 Agency under this complaint, as filed. There's  
10 two parts to it. I've given the authority for  
11 both, and I think the law was without question  
12 on both issues. One is a decision of the  
13 present Administrator of this Agency, affirmed  
14 by the 7th Circuit Court of Appeals, whose  
15 circuit Gary is in; and the second is a  
16 decision in the two other decisions by U. S.  
17 Supreme Court, written by the present -- in the  
18 1981 case -- the present Chief Justice of that  
19 court concurred in, excepting one member of the  
20 U. S. Supreme Court, that collateral estoppel  
21 applied in these types of proceedings, that res  
22 judicata applies.

23 This action is totally barred. This  
24 Agency has absolutely no authority to drag my

1 client into this proceeding, when the State of  
2 Indiana has been specifically given Phase I  
3 authorization, and it's my understanding  
4 they've even been given Phase II authorization  
5 at the present time; not only on 265  
6 regulations, but on 264 regulations. At least  
7 that's what the U. S. Justice Department argued  
8 in front of the 7th Circuit Court of Appeals,  
9 when he held all argument in the case which I  
10 have cited to the Judge here. And I assume he  
11 was arguing correctly, when he got up on behalf  
12 of the Agency and the Department of Justice and  
13 said that Indiana at that date, even after  
14 Phase II operations, there was absolutely no  
15 excuse for this Agency filing this complaint;  
16 there is no excuse, whatsoever. They've argued  
17 absolutely the opposite in a case,  
18 successfully, against another one of my  
19 clients; and now they drag another one in,  
20 taking the absolute opposite position under the  
21 law.

22 The decision, Your Honor, that I've just  
23 cited to you -- and I'll get you the Fed. 2d  
24 cite on the 7th Circuit case -- but the cause

1           number at the 7th Circuit was 85-21 of 19; and  
2           I do have copies of the slip decision for  
3           yourself and for opposing counsel. We are  
4           asking at this point that this case be  
5           dismissed for lack of jurisdiction, based upon  
6           the two legal issues we have raised.

7                     THE COURT: Thank you,  
8           Mr. Krebs. Mr. Radell, you may respond.

9                     MR. RADELL: Yes. The EPA would like  
10          to respond to these novel arguments; novel in  
11          the sense that they not only provide a new  
12          unintended twist to the law, but that they were  
13          never mentioned before to Complainant, so that  
14          they are new to Complainant. The EPA would  
15          also like to reserve its right to respond fully  
16          to these claims, if necessary, in a supplement-  
17          al post-hearing brief, after we've had time to  
18          research the allegations.

19                    Just by means of a brief reply, I would  
20          state that the Northside case applied to review  
21          of a closure plan. This, the instant case,  
22          concerns enforcing RCRA provisions, concerning  
23          the loss of interim status for the -- since  
24          this facility never had interim status, the

1 fact that they have to close, due to not having  
2 obtained interim status. Our complaint does  
3 not require approval of the closure plan by  
4 U. S. EPA, as Respondent alleges. It requires  
5 submittal of the plans to the Indiana  
6 Department of Environmental Management and  
7 submittal of a copy to EPA, to ensure the fact  
8 that Respondent is complying with the  
9 complaint. The complaint specifically says  
10 that Respondent shall -- request that  
11 Respondent implement the closure plan, as  
12 approved by IDEM. It does not refer to  
13 approval by U. S. EPA.

14 I also state that there's other case law,  
15 namely the Conservation Chemical Company of  
16 Indiana case in the Northern District of  
17 Indiana, which distinguishes this Northside  
18 case from other cases where EPA retains its  
19 authority and where to enforce closure and  
20 where the State has referred that action as to  
21 here, to U. S. EPA for enforcement.

22 As far as this agreement between Gary  
23 Development Company and the State of Indiana  
24 goes, the agreement does not even cite the

1 statute under which it was entered, so we are  
2 unaware of whether this purports to be entered  
3 under RCRA and even involve the same sorts of  
4 claims. It just deals with the Respondent's  
5 status as a sanitary landfill. It does not  
6 mention hazardous waste, which is the subject  
7 of our allegations. I would also point out  
8 that any authorization of the State of Indiana  
9 to run its program under RCRA, would not  
10 authorize it to enter into an agreement which  
11 would allow violations of RCRA which are  
12 clearly occurring at the facility. So,  
13 therefore, the agreement, if it does allow  
14 Respondent to operate in violation of RCRA, has  
15 to be invalid because it exceeds the state's  
16 authority under the state's agreement with  
17 U. S. EPA. And, similarly, those require-  
18 ments -- arguments would apply to the res  
19 judicata argument, that since these claims are  
20 not the same claims that are in our complaint,  
21 then res judicata and estoppel does not apply  
22 in this case.

23 Once again, I would reserve our right to  
24 supplement this argument with a post-hearing

1           brief, if the Judge feels it necessary.

2                   THE COURT: Well, Mr. Radell, I  
3           understand Mr. Krebs to be arguing that if  
4           Indiana has been authorized to handle hazardous  
5           waste enforcement, the EPA is out of the  
6           business, altogether, with respect to this  
7           Respondent.

8                   MR. RADELL: I would argue that the  
9           statute itself retains EPA's authority to take  
10          the enforcement action and authorize states,  
11          providing only that -- the only jurisdictional  
12          requirement being that the EPA notify the  
13          State. This is found in section 3008(a) of  
14          RCRA, and it is explained in more detail in the  
15          Conservation Chemical case to which I alluded  
16          earlier.

17                  THE COURT: Now, how does the fact  
18          that the Northside case applied only to a  
19          closure plan? Distinguish it from this case,  
20          Mr. Radell.

21                  MR. RADELL: Yes. I have not  
22          reviewed the case in depth; but with just a  
23           cursory review and past recollection of it  
24          having been discussed outside this proceeding,



1           that case concerns the review of a closure  
2           plan. It did not concern actually enforcing  
3           closure. It provided the specifics of the  
4           closure plan. Once again, I have to say that  
5           this is just my impression, and I reserve my  
6           right to supplement this with a post-hearing  
7           brief.

8           We allege many other things besides  
9           closure. We allege several violations with the  
10          interim status standards. We allege failure to  
11          submit groundwater monitoring requirement  
12          certifications and financial assurance  
13          requirement certifications. Those are  
14          violations which are independent violations  
15          under RCRA with independent sanctions and  
16          penalties assessed, which do not necessarily  
17          equal the closure implementation of an approved  
18          closure plan. And also we reserve the state's  
19          right and jurisdiction to review the closure  
20          plan explicitly and to review that request in  
21          the complaint.

22          I would like to read to Your Honor Section  
23          3008(a)(2) of RCRA, which refer to EPA's  
24          jurisdiction in all of our states. It says in

1 the case of a violation of any requirements of  
2 this sub-chapter, where such violation occurs  
3 in a state which is authorized to carry out a  
4 hazardous waste program under Section 6926 of  
5 this title, the Administrator shall give notice  
6 to the state in which such violation has  
7 occurred, prior to issuing an order or  
8 commencing a civil action under this section.  
9 That clearly implies, if it does not say so  
10 explicitly, that EPA retains the authority to  
11 take enforcement actions, so long as it  
12 notifies the state in an authorized state. And  
13 as part of our testimony today, EPA shall prove  
14 that EPA submitted that notification and it  
15 shall introduce into evidence a copy of our  
16 notification of this action to the State of  
17 Indiana.

18 THE COURT: All right, thank you.  
19 I'll withhold ruling on this for the time  
20 being.

21 MR. KREBS: Your Honor, may I respond  
22 briefly?

23 THE COURT: Yes, you may, Mr. Krebs.

24 MR. KREBS: I apologize for

1 interrupting, and I'll try to be brief on this.  
2 But I think that is a very very important  
3 issue, and I think it's really silly to sit  
4 here and have hearings and call witnesses and  
5 subpoena people, which I've had to do, etc., if  
6 this Agency really is determined by its  
7 Administrator that it really doesn't hear these  
8 kind of cases, anyway. So I think it is an  
9 important decision for this Judge to make.

10 On the issue, opposing counsel has argued  
11 in his comments that we failed to raise this  
12 issue previously. First of all, without  
13 question in any court of law and applicable  
14 agencies, jurisdiction can be raised at any  
15 time in any proceeding. It can be the minute  
16 before the jury goes out, and we can decide  
17 that that court doesn't have jurisdiction. We  
18 don't have to raise this issue years in  
19 advance. Jurisdiction is the fundamental issue  
20 that can be raised at any time. You cannot  
21 waive raising jurisdiction, it's impossible.  
22 The Court either has it or it doesn't have it.

23 The second thing is, we did raise this  
24 issue. And in our answer -- not only we didn't

1           have to, but we did -- in our answer we said in  
2           paragraph one, and I'll quote on the first  
3           page, "Gary denies the jurisdictional summary  
4           set forth at page two of the complaint. It  
5           objects to the Region V's alleged attempts to  
6           enforce regulations of the State of Indiana and  
7           disputes both the subject matter and personal  
8           jurisdiction of Region V." I don't know how we  
9           could have been any more clear, unless we cited  
10          all the cases and started giving briefs and --

11                 THE COURT: I don't have any problems  
12          with your having raised it, Mr. Krebs.

13                 MR. KREBS: The second point I would  
14          like to raise is, the case by Administrator Lee  
15          was absolutely not as counsel is surmising, a  
16          case involving the technical parts of closure.  
17          It was a case determining whether closure would  
18          apply to what portions of the facility, the  
19          first issue. That's precisely what that case  
20          determined, and that's precisely what Region V  
21          is asking this Judge to determine in this case,  
22          whether closure regulations apply to this  
23          facility. That's exactly the issue before the  
24          Administrator. I argued that case, I was

1 involved in that case; and I can assure this  
2 Judge that at that time there was no issue as  
3 to the details of a closure plan. I don't even  
4 think there was a closure plan filed at that  
5 time, to the best of my recollection. But that  
6 was not the issue. The issue was whether we,  
7 Northside Landfill as a regulated facility, was  
8 entitled to a hearing before a Federal Judge of  
9 EPA as to whether the facility would close and  
10 what portion of it would close. That's exactly  
11 the same issue that they're asking you to  
12 decide here.

13 The third thing is, they're not just  
14 asking you to decide that issue. They are  
15 totally excerpting the authority of the State  
16 of Indiana. And I hate to belabor the point;  
17 but, I mean, look at what they're asking for.  
18 If you specifically look in their complaint --  
19 and I won't read it verbatim, but I would like  
20 to point out a thing in here. Page 13, under  
21 what they want in the order, they want that we  
22 be ordered to file closure plan and  
23 post-closure plan within 30 days. Okay, they  
24 want to determine the period. They say the

1 plan must describe activities that will meet  
2 the requirements for a landfill closure and  
3 post-closure; submit to IDEM cost estimates,  
4 annual costs.

5 Next page, page 14, Section (b),  
6 Respondent shall within 30 days of this order  
7 becoming final submit to U. S. EPA and IDEM for  
8 approval a plan and implementation schedule,  
9 not to exceed 120 days, for a groundwater  
10 quality assessment program for the whole  
11 landfill, it goes on to read. Why is it being  
12 submitted to them for approval? It doesn't  
13 make any sense. I mean, I didn't write this  
14 document, if they are arguing that it's not  
15 specific.

16 The next page says -- in paragraph two on  
17 the next page, they say the proposed well  
18 system must consist of monitoring wells and  
19 they go on to describe what they specifically  
20 want. They even want to tell the State what  
21 they have to put in the closure plan and have  
22 this hearing officer or judge order that.

23 The next page, this is page 14, towards  
24 the top of the page, monitoring wells must be

1           cased in a manner that maintains the integrity  
2           of the monitoring wells or whole, and it goes  
3           on to describe how they want it done. They  
4           describe the sampling plans that they want,  
5           what they want in sampling plans. Everything  
6           in here reads like a closure plan. And they  
7           are specifically wanting this agency to do  
8           what, without question, the State of Indiana  
9           has been authorized to do. They are not even  
10          limiting the issue to the determination of  
11          whether closure applies to this site. They  
12          want a four-page, five-page order from this  
13          Agency as to what will be done and when it will  
14          be done. That's totally inconsistent with  
15          their position, not only in the prior  
16          decisions, but what they just argued here  
17          before in this case, absolutely inconsistent.

18                 We think this matter should immediately be  
19          dismissed for lack of jurisdiction. If the  
20          State of Indiana feels that this facility --  
21          RCRA closure applies, they have the absolute  
22          authority under Indiana law to proceed against  
23          this facility under administrative law in  
24          Indiana and the Indiana court system for appeal

1 process, whether we went or they went, and to  
2 determine this issue. That's the proper forum.

3 THE COURT: Mr. Krebs, would you  
4 address Section 3008(a)(2) of the act, where  
5 the Agency reserves the right to proceed,  
6 provided it gives notice to the state.

7 MR. KREBS: Okay. I would like to  
8 know how -- I guess my rhetorical question, my  
9 response to that is, it's the old thing, they  
10 want their cake and eat it, too. They cite a  
11 certain provision, which in the other  
12 decisions, you know, they wanted to ignore.  
13 Now, I don't -- you know, you read through  
14 regulations and through statutes and find some  
15 little clause that says, well, we think we can  
16 do anything because of this clause here. What  
17 I'm looking at is, instead of just looking at  
18 here's the statute and here's the regulations,  
19 is how has this Agency interpreted this  
20 regulation? How have they ruled on them? I  
21 mean, instead of looking at a little statute or  
22 a reg in a vacuum -- I mean I read the regs and  
23 half the time I don't know what they say. I  
24 mean, I read them one way, and I'm right



1 sometimes and found to be wrong other times.

2 What is important is what the Agency's  
3 policy is, how the Agency has interpreted these  
4 regulations, not a small sentence in hundreds  
5 of pages of regulations as to what this clause  
6 means standing by itself. I don't know how  
7 they've applied that clause. There's been  
8 nothing put forth in this complaint about why  
9 this Agency feels it has to proceed here and  
10 why the State hasn't. I mean, is there some  
11 problem? Is the state in misfeasance, are they  
12 not prosecuting environmental laws in the State  
13 of Indiana? I think the answer is no. They  
14 are processing -- enforcing environmental laws  
15 in the State of Indiana.

16 I have no idea why this Agency brought  
17 this case. If we get into the testimony, I  
18 intend to elicit that kind of testimony here  
19 for the record, as to why we're here. If  
20 there's a complaint filed, why did not the  
21 State of Indiana file a complaint, if there is  
22 a gross problem and this site should close  
23 under RCRA, when they had full force? I don't  
24 believe that EPA -- I don't know what section

1 of the statute they want to cite -- can come  
2 here and pick and choose and decide that one  
3 case in this state that they're going to take  
4 and they're going to have the hearing and go up  
5 to the U. S. 7th Circuit Court with the  
6 Department of Justice and argue that they don't  
7 have any authority to give us a hearing, when  
8 we request one. That's exactly what they were  
9 arguing to that court, and we were unsuccessful  
10 in arguing. They just can't have their cake  
11 and eat it, too. It's either one way or the  
12 other. And if that other case is wrong, then  
13 it -- you know, the Agency should have never  
14 argued that case. Maybe I should have appealed  
15 it in U. S. Supreme Court. We ran out of  
16 money, quite frankly, in that particular  
17 matter.

18 But for the Agency to come in here, after  
19 they've made representations to one of the  
20 higher courts, in this court successfully, and  
21 now say that now we have all of this authority  
22 to at least issue closure and determinations,  
23 we think this site should close under RCRA and  
24 we want these 62 acres closed, we want these

1 things filed within certain times, is just  
2 totally inconsistent.

3 I guess what I'm saying to your response  
4 is, I don't know. If that statute was  
5 applicable, it would have been applied in the  
6 Northside case and they were doing the exact  
7 opposite. I specifically argued this case,  
8 that they did not have this authority and would  
9 not give us -- refused to give us a due process  
10 hearing, refused to give us a hearing on  
11 precisely the same issue involved in this case.

12 THE COURT: Anything further,  
13 Mr. Radell?

14 MR. RADELL: Yes. I would maintain  
15 that the Agency is not trying to have its cake  
16 and eat it, too; but if it is our cake, we have  
17 a right to eat it. I would point out that in  
18 the complaint there sets out on page 13 that  
19 respondent shall prepare and submit the closure  
20 plan and post-closure plan to the Indiana  
21 Department of Environmental Management, with a  
22 copy to Complainant, the copy being to ensure  
23 that the Respondent is complying with the  
24 proposed quarter by complying with the State of

1 Indiana.

2 All the requirements that are listed here,  
3 requirements for the closure plan, are  
4 requirements taken from the Indiana  
5 regulations; and that on page 17 of the  
6 complaint, where it refers to implementation of  
7 the plan, then that's the only place where it  
8 refers to approval of the plan. It says  
9 Respondent shall implement the closure plan,  
10 after it has been approved by IDEM, as required  
11 by 320 IAC, etc. It does not refer to approval  
12 by U. S. EPA.

13 Something else came to my attention when I  
14 was reviewing the Northside Sanitary Landfill  
15 decision. That referred -- this decision in  
16 the petitions under -- and the facts of this  
17 case apply to a RCRA permit proceeding.  
18 Apparently, Petitioner was denied a permit by  
19 the State of Indiana and somehow tried to  
20 appeal that permit to the U. S. EPA. So right  
21 there, I would like to distinguish the facts  
22 here. This is not a permit proceeding. This  
23 is a 3008(a) proceeding.

24 And also, as counsel for Respondent

1       stated, the Northside case considered which  
2       units at a facility should be closed, the  
3       underlying assumption being that the facility  
4       itself should close. In this case we are  
5       trying to determine that the facility itself  
6       must close, and it will be entered as such in  
7       the closure plan approved by the State of  
8       Indiana exactly which units within the facility  
9       must close and how they must close. We are  
10      addressing the broad issue of the closure here,  
11      but it will be the State of Indiana which  
12      determines which units within the facility must  
13      close and exactly how they must close.

14             And, furthermore, I would like to say that  
15      in the complaint we set forth all the basis for  
16      our jurisdiction as we believe them; and that  
17      the appropriate way for Respondent to contest  
18      that was through a motion to dismiss, perhaps  
19      shortly after receiving the complaint and not  
20      at this point.

21             MR. KREBS: Your Honor, I apologize  
22      for the exchange, but it's totally incorrect  
23      what counsel is saying. The Northside case did  
24      not involve a situation where the company was

1       appealing a permit denial, they wanted a  
2       permit. That company had withdrawn its permit  
3       application. It's just totally untrue. I  
4       mean, that's not what happened in that case.  
5       That case involved the language in the permit  
6       denial where Region V, the same Region V here,  
7       ordered the facility to close under RCRA.  
8       That's what the issue was, that went up to the  
9       Administrator. It was not an appeal of the  
10      permit itself, whether the landfill should have  
11      or should not have a permit. The landfill had  
12      withdrawn its permit application, Part B  
13      application. The question was exactly the  
14      question that's in front of you.

15               THE COURT: Thank you. My microphone  
16      goes off and on, just like The Judge said.

17              I haven't read the Northside Landfill case  
18      for about a year. It's been about a year since  
19      it came out. So I will at least take the  
20      opportunity to review the materials that you've  
21      presented, Mr. Krebs. But and in the meantime,  
22      I think we should proceed.

23              Now, I would like to consider documents  
24      offered by the Government. I understand there

1 will be some objections to them. If you'd  
2 like, you can take them one at a time, unless  
3 you prefer to proceed through your witnesses  
4 with them. I would like to take them now,  
5 Mr. Radell.

6 MR. RADELL: Well, it's up to you,  
7 Your Honor.

8 THE COURT: Then let's start with  
9 number one.

10 MR. RADELL: I can enter it through  
11 the course of my testimony I do. Part of it is  
12 what's laying the foundation for each  
13 individual exhibit, since some of them do have  
14 different basis for admission. But I would  
15 just like to point out that even though the  
16 rules of evidence are a guideline to the  
17 admission of evidence in administrative  
18 proceedings, that 40 CFR, Part 22, makes it  
19 clear that all relevant documents must be  
20 admitted.

21 THE COURT: Yes, I'm acquainted with  
22 the rule. If you wish to proceed that way,  
23 that's perfectly all right. You may call your  
24 first witness.

NOTES



1 MR. RADELL: Complainant calls Ted  
2 Warner.

3 (WITNESS SUMMONED AND SWORN BY THE REPORTER)

4 THE COURT: You may be seated,  
5 please. Spell your name for the reporter and  
6 give her your business address

7 THE WITNESS: My name is Ted F.  
8 Warner, and that's W-A-R-N-E-R; and my business  
9 address is 105 South Meridian Street,  
10 Indianapolis, Indiana.

11 THE COURT: Mr. Radell.

12 TED WARNER,  
13 having been first duly sworn, was examined and  
14 testified as follows:

15 D I R E C T E X A M I N A T I O N

16 BY MR. RADELL

17 Q. Mr. Warner, where are you employed,  
18 currently?

19 A. I'm employed by the Indiana  
20 Department of Environmental Management, Office  
21 of Solid and Hazardous Waste Management Branch,  
22 Compliance Monitoring Section.

23 Q. Thank you. How long have you been  
24 employed there?

1           A.    I've been employed with that section  
2           for approximately three years.

3           Q.    Have you worked with another state  
4           agency, prior to working for IDEM?

5           A.    Yes, I did.  I worked for the  
6           predecessor agency to IDEM, which was the  
7           Indiana State Board of Health, Conditional  
8           Solid Waste and Hazardous Waste Management.

9           Q.    Were your duties with both of those  
10          agencies essentially the same?

11          A.    Yes, they were.

12          Q.    And what are those duties?

13          A.    My duties are the inspection of  
14          facilities in Northwest Indiana that treat,  
15          store and dispose or transport hazardous waste.

16          Q.    All right.  Do you have an under-  
17          graduate degree?

18          A.    Yes, I do.

19          Q.    Where is it from?

20          A.    Indiana State University.

21          Q.    When did you get it?

22          A.    In 1973.

23          Q.    And in what subject?

24          A.    Environmental Health and Sanitary

1 Science.

2 Q. Have you had any training since your  
3 obtaining your undergraduate degree, relating  
4 to your field?

5 A. Yes, I have.

6 Q. And what sort of training?

7 A. I have been trained in inspection  
8 techniques, through in-house programs with the  
9 IDEM. I participated in EPA oversight  
10 inspection programs, where I am -- my  
11 inspections are reviewed by EPA. I receive  
12 training from the Department of Transportation  
13 for transportation of hazardous materials and  
14 waste. I've received training in hazardous  
15 waste, white collar crimes from the National  
16 Institute of Training.

17 THE COURT: Excuse me. We  
18 didn't hear the last.

19 THE WITNESS:

20 A. Other training similar to what I've  
21 described.

22 MR. RADELL:

23 Q. And it's been pretty much regular,  
24 on-the-job training over your 15 years with

1           these agencies?

2           A.    Yes, they have.

3           Q.    Okay.  Are you a registered inspect-  
4           or?  Do you have any sort of license to do what  
5           you're doing?

6           A.    I'm a Registered Professional  
7           Sanitarian within the State of Indiana.

8           Q.    Okay.  Approximately how many  
9           inspections of hazardous waste management  
10          facilities have you conducted over your 15  
11          years with the State?

12          A.    Approximately 175.

13          Q.    Have you been to the Gary Development  
14          Company?

15          A.    Yes, I have.

16          Q.    Have you inspected it for the pur-  
17          pose of other inspections?

18          A.    Yes.

19          Q.    About how many times have you been  
20          there?

21          A.    I have been there on three occasions.

22          Q.    Has the State of Indiana ever  
23          corresponded with Gary Development Company and  
24          communicated the fact that the State of Indiana

1 considers Gary Development Company subject to  
2 regulation under RCRA?

3 A. Yes, it has.

4 Q. Okay. I'm showing the witness a  
5 document which I have preliminarily labeled as  
6 Plaintiff's Exhibit Number Eight.

7 Have you seen this letter before,  
8 Mr. Warner?

9 A. Yes, I have.

10 Q. As part of your duties at IDEM, would  
11 you keep such a letter in your file and have  
12 reviewed it?

13 A. Yes, I would.

14 Q. Could you -- could you describe the  
15 letter, like who it's from and to whom it is  
16 addressed?

17 A. The letter is from Guinn Doyle, Chief  
18 of the Hazardous Waste Management Branch, who  
19 is no longer employed by that agency, to Warren  
20 D. Krebs.

21 Q. And is the copy of this letter on any  
22 official letterhead?

23 A. Yes.

24 Q. Could you describe briefly what the

1 letter communicates, specifically the second --  
2 the third full paragraph on the first page,  
3 which begins with "Gary Development Company's"?

4 A. The letter states, "Gary Development  
5 Company's previous attorney has admitted that  
6 hazardous --"

7 MR. KREBS: Objection,  
8 objection. We're going to object,  
9 before the document itself is put  
10 into evidence, to be read into the  
11 record, Your Honor; and move that any  
12 of his comments be stricken. I  
13 didn't get my objection out quick  
14 enough.

15 THE COURT: Yes, let's -- Mr.  
16 Radell?

17 MR. RADELL: I would like to  
18 move at this point to introduce this  
19 document into evidence.

20 THE COURT: Well, Mr. Krebs, do  
21 you have an objection to this?

22 MR. KREBS: Yes, we do. I have  
23 a couple of preliminary questions, if  
24 I may, for the purpose of framing the

1 objection.

2 THE COURT: Yes.

3 V O I R D I R E E X A M I N A T I O N

4 BY MR. KREBS

5 Q. Complainant's Exhibit Number Eight,  
6 were you involved in the drafting of this par-  
7 ticular letter, signed by whom you've identi-  
8 fied as Guinn Doyle?

9 A. No, I was not.

10 Q. Did Mr. Doyle consult with you at all  
11 regarding the opinions which he sets forth in  
12 this letter, specifically related as to Gary  
13 Development Company?

14 A. Yes.

15 Q. Mr. Doyle was, it says here, the  
16 Chief of Hazardous Waste Management Branch at  
17 that time, of the Indiana State Board of  
18 Health.

19 A. Yes.

20 Q. And I believe he stated he is no  
21 longer with the Agency?

22 A. Correct.

23 Q. Is it correct that he was, though,  
24 with the successor agency, the Department of

1 Environmental Management?

2 A. Yes.

3 Q. Do you know up until when?

4 A. Very recently, three or four months  
5 ago.

6 Q. Do you know where Mr. Doyle's where-  
7 abouts are, presently?

8 A. Yes. He's in Indianapolis.

9 Q. Indianapolis?

10 A. Yes.

11 MR. KREBS: Your Honor, we would  
12 object to the admission of this  
13 document into evidence.

14 We have two objections. The  
15 first objection is that the document  
16 constitutes hearsay. It is being  
17 offered in connection with  
18 out-of-court statements, that applies  
19 as to whether they are verbal or  
20 written, made by Mr. Doyle as proof  
21 of the matters contained therein.

22 THE COURT: Well, just a moment.  
23 I haven't yet heard what the purpose  
24 of the offer is. I don't know



1                   whether it's --

2 MR. KREBS: I guess what I'm  
3 saying is there was no limitation  
4 placed upon the motion to have it  
5 admitted. I'm normally of the  
6 opinion that if there's no limita-  
7 tion, then it's admitted for all  
8 purposes.

9 THE COURT: Mr. Radell, what's  
10 the purpose of offer?

11 MR. RADELL: The purpose of the  
12 offer is to demonstrate that the  
13 State of Indiana did notify Gary  
14 Development Company that it was the  
15 State of Indiana's opinion that Gary  
16 Development Company was subject to  
17 regulation under RCRA, given the fact  
18 that Gary Development Company in its  
19 opening statement said that it was  
20 their opinion that they were not.

21 And I would like to add that  
22 this document is a document which the  
23 State of Indiana has prepared, in  
24 conjunction with its enforcement

1 duties in the preparation of its  
2 civil case under its statutory  
3 authority; and that Mr. Warner has  
4 copies of this document, because of  
5 his same duties under the same  
6 authorities, and that a public record  
7 is an admission to hearsay -- excuse  
8 me, it is an exception; and that any  
9 statements contained in here are made  
10 by Gary Development Company's  
11 previous attorney, who would be an  
12 agent for Gary Development Company;  
13 and, therefore, they would be  
14 admissible as an admission in this  
15 interest and not even hearsay.

16 THE COURT: Well, I'm a little  
17 confused as to whether you're offer-  
18 ing it for the truth of everything in  
19 it -- in which case arguments,  
20 whether or not it's hearsay or excep-  
21 tions to hearsay, are appropriate --  
22 or whether you are offering it only  
23 to demonstrate that the State did  
24 believe Gary was subject to this

1 regulatory scheme and not need notify  
2 Gary of that fact.

3 MR. RADELL: I was admitting it  
4 to show that the State did notify  
5 Gary of that fact and that it was the  
6 State's opinion to help explain why  
7 this state proceeded as it did with  
8 the inspections and subsequent to  
9 RCRA enforcement.

10 THE COURT: Very well, then, and  
11 not for the purpose of you showing,  
12 independently, that this Respondent  
13 was in violation of the regulatory  
14 scheme?

15 MR. RADELL: No, nor to show  
16 that they were doing so willingly.

17 THE COURT: All right. Mr.  
18 Krebs, now, let me hear your objec-  
19 tion again.

20 MR. KREBS: Yes. Thank you,  
21 Your Honor. The objection is  
22 two-prong. The first objection is  
23 it's still hearsay. In fact, after  
24 the explanation, it's double hearsay.

1 Counsel has just said they want to  
2 put this document, which is written  
3 by a different person, who is --  
4 there's no showing that the person is  
5 unavailable for trial. They want to  
6 put this in through a witness. It is  
7 not the official opinion of the State  
8 of Indiana. It is an opinion of one  
9 individual. Now, he's not even the  
10 head of the Agency; he's not the  
11 Commissioner of the Board of Health;  
12 he's not the Technical Secretary of  
13 the Environmental Management Board;  
14 he's not the Commissioner of the  
15 Department of Environmental Manage-  
16 ment. It's one employee. It's their  
17 opinion that constitutes hearsay,  
18 that his opinion should be valued,  
19 his interpretation of the law.

20 The second thing is that counsel  
21 has alluded to is that there's some  
22 statement alleged in here to be from  
23 a prior attorney of Gary Development;  
24 that's double hearsay. We've got an

1           unavailable witness writing a docu-  
2           ment as to his opinion, basing it  
3           upon an alleged comment by a third  
4           party, who's not here either. So we  
5           have a double hearsay problem. It  
6           does not fit within an exception of a  
7           public document to the hearsay rule.

8           It is not -- in fact, that's the  
9           second part of our objection, the  
10          document is not even certified, it's  
11          not authenticated. There's nothing  
12          on this document to indicate it's a  
13          authentic record of the State of  
14          Indiana, other than it's on a  
15          letterhead; and that just doesn't fly  
16          under the rules of Federal evidence,  
17          specifically under rule 901 and 902.

18          Under 901 and 902, documents  
19          have to be authenticated, in addition  
20          to our hearsay objection. And,  
21          specifically, if this is a public  
22          record, there is a specific  
23          provision, 902 (4), which provides it  
24          must be by certified public record.

1                   There's absolutely no certification  
2                   on this document, whatsoever, none.

3                   THE COURT: Well, Mr. Krebs, as  
4                   you know, this proceeding is not  
5                   bound by the Federal Rules of Evi-  
6                   dence, even though from time to time  
7                   I think that would be a good idea;  
8                   and the rules here provide that  
9                   hearsay maybe taken in.

10                  Now, this document, I will  
11                  admit. I will, basically for the  
12                  purposes stated by counsel, not for  
13                  the purpose of the truth of any  
14                  statements made by the previous  
15                  counsel.

16                  MR. RADELL: Perhaps, we do not  
17                  seek to admit this as an admission of  
18                  facts.

19                  THE COURT: Very well. Number  
20                  Eight is admitted.

21                  (Complainant's Exhibit No. 8 Admitted)

22                  MR. RADELL:

23                  Q. Could you read paragraph two, please.

24                  A. The letter states that Gary

1 Development Company's previous attorney has  
2 admitted that hazardous waste was disposed of  
3 by your client after the effective date,  
4 December 19 --

5 MR. KREBS: Wait a minute, wait.  
6 Your Honor, we're going to object to  
7 the witness reading certain portions  
8 of the letter. We would ask the  
9 Court to read -- the Judge to read  
10 the entire document.

11 THE COURT: Well, I will read  
12 the entire document, and I don't  
13 think we necessarily have to put it  
14 in the record we're making. The  
15 document is in evidence, Mr. Radell.  
16 I've already read it, for that  
17 matter, and it's short. Continue.

18 We also are going to save as  
19 much time as we possibly can. Since  
20 I have come to Gary and every moment  
21 I spend here is consuming public  
22 funds, and as true for other people  
23 in the courtroom, we will be as short  
24 as we can with every matter we

1 address.

2 MR. RADELL: So, based upon that  
3 statement, does Your Honor want me to  
4 try to lay the foundation for each  
5 document that I seek to introduce  
6 into evidence, which may lengthen  
7 these proceedings considerably?

8 THE COURT: Well, yes, I think  
9 you'll have to do that where it's  
10 appropriate. I'm merely thinking we  
11 need not read portions of the docu-  
12 ments into the record, after they  
13 have been admitted into evidence.

14 MR. RADELL: All right. But the  
15 witness may still summarize the  
16 contents, if they are relevant?

17 THE COURT: The witness may  
18 continue with his testimony, yes.

19 MR. RADELL:

20 Q. Mr. Warner, you said previously that  
21 you had performed three inspections at the Gary  
22 Development Company's facility. When was the  
23 first inspection?

24 A. On June 17th of 1985.



1 Q. Did you memorialize your -- well,  
2 first, do you remember all the details of that  
3 inspection?

4 A. Yes.

5 Q. Okay. So you don't need anything to  
6 refresh your memory, okay.

7 THE COURT: Mr. Radell, the  
8 Court Reporter can't see you and  
9 can't hear you.

10 MR. RADELL:

11 Q. Mr. Warner, did you prepare any  
12 documents after you did that inspection, any  
13 report summarizing?

14 A. Yes, I did.

15 Q. Did you prepare a memo to the RCRA  
16 file?

17 A. Yes, I did.

18 Q. Okay. Is this is a copy of that  
19 memo? (Tendered.)

20 A. Yes, it is.

21 MR. RADELL: I have shown the  
22 witness a document which I have  
23 marked as Complainant's Exhibit  
24 Number 11, and I would like to

1 introduce that into evidence.

2 THE COURT: Very well, Number 11  
3 is offered. Mr. Krebs?

4 MR. KREBS: Could I have just a  
5 moment here? I would like to take a  
6 glance at this.

7 MR. RADELL: Incidentally, I  
8 would like to explain the esoteric  
9 numbering of the exhibits. They are  
10 the same numbering that were in the  
11 pre-hearing exchange, which were  
12 submitted several months ago.

13 THE COURT: I guess it doesn't  
14 seem esoteric to me. I did have one  
15 proceeding where all exhibits were in  
16 Roman Numerals; that I thought was  
17 esoteric. These are very familiar  
18 numbers, even though not offered in  
19 the same sequence. Go ahead.

20 MR. RADELL:

21 Q. At your inspection --

22 MR. KREBS: I'm not trying to  
23 interrupt, but can I ask a  
24 preliminary question?

V O I R   D I R E   E X A M I N A T I O N

BY MR. KREBS

Q.     The copy that I have here, Mr. Warner, is bracketed on the first page, last paragraph, and there's some underlining. Is that the same on the one that's in front of you?

A.     Yes, it is.

Q.     Do you know what the purpose is of that highlight?

A.     No, I do not.

Q.     Do you know who put the highlighting on the document?

A.     No, I do not.

MR. RADELL:   I would like to say that these are the copies that were in U. S. EPA files and that's how they arrived, stapled, with those markings on there. So we don't know what they mean, either.

Is the document admitted?

THE COURT:   Well, we're waiting for Mr. Krebs to --

MR. KREBS:   I'm going to object

1 to the document because of the  
2 highlighting on it. I think it's  
3 improper to offer into evidence  
4 documents that have been highlighted  
5 by someone. It calls some attention  
6 to someone -- I assume the Judge --  
7 and we don't even know who did the  
8 highlighting. I've had many docu-  
9 ments not admitted, you know, because  
10 people highlighted them; even my  
11 documents I've offered to the State  
12 Agency before, when I've admitted  
13 them into an administrative hearing,  
14 because someone had used a high-  
15 lighting on certain parts of it.

16 THE COURT: Well, I never kept  
17 one out for that reason, and since  
18 I'm not a jury and presumably will  
19 not be influenced by this.

20 I have brackets. I don't seem  
21 to have underlining, maybe it didn't  
22 make the duplication.

23 MR. KREBS: Mine appears to have  
24 some underlining on it.

1 MR. RADELL: I would point out  
2 that we're not even going to be  
3 referring to the bracketed paragraph.

4 MR. KREBS: Okay.

5 THE COURT: I'll find the  
6 Plaintiff finds it objectionable for  
7 that reason. The document is admit-  
8 ted as Number 11 for the Complainant.  
9 (Complainant's Exhibit No. 11 Admitted)

10 D I R E C T E X A M I N A T I O N

11 BY MR. RADELL

12 Q. During your June 16th, 1985  
13 inspection, did you interview Mr. Hagen?

14 A. Yes.

15 Q. Did he state at that time that this  
16 facility had not filed a Part A application --  
17 excuse me, had filed a Part A application, but  
18 had not filed, quote, postcard notification?

19 A. Yes, he did.

20 Q. Did Mr. Hagen admit that this  
21 facility received between 28 and 33 loads of  
22 manifested paint sludge from American Chemical  
23 Services, to the best of his knowledge, in 1980  
24 or '81?

1 A. Yes, he did.

2 Q. Did he also state that Gary Develop-  
3 ment Company received broken battery casings  
4 and neutralized calcium sulphate sludge from  
5 USS Lead Company?

6 A. Yes, he did.

7 Q. Do you have any working knowledge of  
8 that waste from USS Lead?

9 A. Yes, I do.

10 THE COURT: I'm sorry, I didn't  
11 hear the question.

12 MR. RADELL:

13 Q. Do you have any working knowledge of  
14 that waste from USS Lead?

15 A. Yes, I do.

16 Q. Based upon your working knowledge,  
17 how would you classify that waste?

18 MR. KREBS: I'm going to object  
19 to the question. If you're going to  
20 have an opinion as to waste  
21 classification on working knowledge,  
22 I just don't understand what that  
23 means. If the witness is going to be  
24 qualified as an expert to classified

1 waste -- which is basically a sci-  
2 ence, it involves chemistry -- then  
3 he should be qualified; or if he has  
4 a document in which that's already  
5 been done, they may be offering that  
6 into evidence; but just say upon your  
7 working knowledge, what do you think  
8 this waste is, is totally unfounded.  
9 This witness has not been qualified  
10 to give such opinions.

11 MR. RADELL: Even though the  
12 witness is not a chemist by trade, he  
13 is an inspector with 15 years  
14 experience, who can read manifest and  
15 who would be able to identify that  
16 waste, based upon a scientist's  
17 classification, which lead to  
18 manifest being labeled in a certain  
19 way or the USS Lead Company calling  
20 the waste that certain listed waste  
21 number. So it is on that basis that  
22 I would ask him to answer the  
23 question.

24 THE COURT: Well, this testimony

1 is based upon an interview with  
2 Mr. Hagen, is that right?

3 MR. RADELL: Uh-huh.

4 THE COURT: And it was Mr. Hagen  
5 who said broken battery casings had  
6 been received. Now, the question is  
7 what classification is this material.  
8 I will allow you to show that this  
9 witness has some background or  
10 experience with doing that. It may  
11 very well require a different ability  
12 or knowledge than the inspection  
13 techniques and so on that you have  
14 already mentioned in your connection  
15 with his qualifications.

16 MR. RADELL:

17 Q. Could you set forth for us on what --  
18 how you obtained your working knowledge, so  
19 that you could identify that for the basis of  
20 your duties as characteristics of Hazardous  
21 Waster Number D008?

22 A. In the course of my duties, I've also  
23 inspected USS Lead Company in East Chicago; and  
24 I've had numerous opportunities to review their



1 records at that facility, as well as reviewing  
2 analytical results from sampling conducted by  
3 U. S. EPA; and those records indicated those  
4 wastes to be hazardous for lead.

5 Q. At your inspection, did you ask  
6 Mr. Hagen to demonstrate his facility's  
7 compliance with the different aspects of RCRA?

8 A. Yes, I did.

9 Q. And was he able to do that?

10 A. No, he was not.

11 Q. For all aspects of RCRA or was he in  
12 compliance with any of them?

13 A. Only one area where he was in  
14 compliance.

15 Q. And was that with the artificial  
16 barrier control of entry requirement?

17 A. Yes.

18 Q. While you were at the facility, did  
19 you do a search on a leachate collection pond?

20 A. Yes, we did.

21 Q. Did that leachate -- well, where did  
22 the leachate going into that pond come from?

23 A. From the landfill itself.

24 Q. Did -- well, based upon your working

1 knowledge and 15 years as an inspector -- I  
2 realize that you haven't sampled the pond  
3 waters -- but did the waters appear to be  
4 contaminated, as you have seen such other pond  
5 waters at other facilities?

6 A. Yes, it did.

7 MR. KREBS: Objection, Your  
8 Honor. Move to strike the witness'  
9 answer. The question was, even asked  
10 by counsel, that what they're now  
11 calling leachate -- I have two  
12 objections. Number one, maybe I'm  
13 wrong, but I don't see anything in  
14 that complaint related to leachate  
15 pond; and I don't believe that's even  
16 an allegation. We're going to object  
17 in this hearing to the raising of  
18 allegations that were not set forth  
19 in the very lengthy complaint by  
20 Region V. If they wanted to discuss  
21 leachate and leachate systems, they  
22 had the obligation to raise it in  
23 their complaint, so that we could be  
24 prepared to answer that specific

1 issue and answer. I don't believe it  
2 was. If I'm wrong on that, I apolo-  
3 gize and counsel will correct me on  
4 it.

5 The second thing is, this  
6 witness just -- well, the question  
7 that he's about to answer says that  
8 what he's calling a leachate pond was  
9 never sampled. A leachate is a word  
10 of art. And in Indiana, as they're  
11 trying to enforce Indiana law -- and  
12 if we can take a break at some mo-  
13 ment, I will quote you the Indiana  
14 definition under 320 IAC (4) -- but  
15 under the definition, it specifically  
16 requires that it's material that  
17 includes certain chemicals.

18 Now, it is absolutely impossible  
19 to determine chemicals in liquid,  
20 unless there is an analysis done of  
21 the sampling. And it's totally  
22 improper for people just to run  
23 around and call things leachate,  
24 which is a regulatory term of art

1           that talks about chemical, if there's  
2           been absolutely no sampling done.

3           Now, this is an environmental  
4           agency. They have the ability to  
5           sample. And to come in here in this  
6           courtroom now, where they just --  
7           this is even worse than hearsay.  
8           We've got an environmental agency  
9           which has laboratories and scientists  
10          on its staff, and now we're going to  
11          call things leachate, which haven't  
12          even been sampled, based upon the  
13          question. Maybe that's not true,  
14          maybe he will provide some sampling  
15          evidence. But I highly object to  
16          that, because leachate is a statutory  
17          regulatory term; it's not just  
18          talking about water.

19          THE COURT: I think you're  
20          saying, among other things, that you  
21          can't tell leachate by looking at it?

22          MR. KREBS: I have had in a case  
23          where the State came out -- the State  
24          of Indiana, the same agency that this

1 gentleman is with, that came out and  
2 sampled something, which it says in  
3 their report was suspected leachate;  
4 and when they sampled it, they found  
5 absolutely no chemicals in the  
6 material, okay. But their report  
7 called it leachate. And if  
8 necessary, I can find those. I don't  
9 have those with me; they're in a  
10 different case.

11 But what they do, if he wants to  
12 determine whether it's leachate, is  
13 this Agency -- which this gentleman  
14 is with -- they sample the material  
15 and determine scientifically, by  
16 analysis, whether it is or isn't. In  
17 that case, they determined it was  
18 not, even though prior documents said  
19 that it was. Based upon a complaint,  
20 they were investigating leachate; and  
21 then later on they determined that it  
22 wasn't leachate. And that's  
23 precisely what I'm objecting to here,  
24 just to call something leachate, when

1 I know the practice of this Agency is  
2 to test it; and I know they have  
3 called things leachate which were not  
4 leachate and it was totally  
5 incorrect.

6 Thirdly, this witness is not  
7 qualified, chemically, to give  
8 opinions of this nature. He's not  
9 qualified scientifically; he's not  
10 testified as to his degrees in  
11 chemistry; and to come in here and  
12 say that he can look at something to  
13 determine whether it's got chemical  
14 in it, when he's not even a chemist,  
15 is totally improper.

16 THE COURT: The first objection  
17 is that this isn't in the complaint,  
18 Mr. Radell. What's your answer to  
19 that?

20 MR. RADELL: I am not introduc-  
21 ing this as a violation alleged in  
22 the complaint, but merely to  
23 demonstrate the potential for harm to  
24 the environment, which is part of the

1 potential health list, which even-  
2 tually justifies the reason that we  
3 assessed the penalty that we did. It  
4 is in the RCRA Penalty Policy, as you  
5 well know, that we may consider as a  
6 problem or potential harm to the  
7 environment.

8 THE COURT: That raises the  
9 question of how the witness knows  
10 this is leachate. I will allow you  
11 to inquire about that.

12 MR. RADELL: Okay.

13 Q. How did you know this was leachate?

14 A. I cannot say for sure how we made the  
15 determination that it was a leachate collection  
16 pond.

17 Q. But based upon your 15 years of  
18 inspections at hazardous --

19 MR. KREBS: Objection, leading  
20 question. The witness has just  
21 answered that question. Now he wants  
22 to feed him a line, because he just  
23 answered they really don't know why  
24 they call it leachate. Now he's

1 going to ask him a leading question  
2 to try to correct his answer.

3 THE COURT: I didn't hear the  
4 question, not yet, anyway. Continue.

5 MR. RADELL:

6 Q. All right. Based upon your 15 years  
7 as an inspector, when you saw the pond, what  
8 made you conclude as you did in your report,  
9 that it was a leachate collection pond?

10 MR. KREBS: Objection.

11 THE COURT: Overruled. You may  
12 attack this on cross.

13 THE WITNESS:

14 A. I included this in my field trip  
15 report, because of my visual observations of  
16 the liquid in that holding pond. The water to  
17 me appeared to have contamination or some  
18 discoloration and oil sheen. In addition to  
19 that, my visual observations were such that the  
20 working face of the landfill would receive all  
21 precipitation run-off from that area, down to  
22 that collection pond.

23 MR. RADELL:

24 Q. Okay. Thank you. Did Mr. Hagen show



1           you any groundwater monitoring wells at this  
2           site?

3           A.     Yes, he did.

4           Q.     Did he say for what parameters those  
5           wells were tested or analyzed?

6           A.     Yes, he did.

7           Q.     And what were those parameters?

8           A.     For 330 IAC 4 parameters.

9           Q.     Could you tell us what those  
10          parameters are or what classifications they  
11          fall into?

12          A.     They are for solid waste disposal  
13          regulations and not hazardous.

14          Q.     Okay.  Would those -- so the testing  
15          for the 330 IAC 4 parameters would not reveal  
16          any contamination by hazardous constituents and  
17          would not be the same --

18                   THE COURT:  No leading questions  
19                   here, Mr. Radell.

20                   MR. RADELL:  I was just trying  
21                   to summarize what he had pretty  
22                   much --

23                   THE COURT:  Summarize it in such  
24                   a way that you don't suggest a

1 response.

2 MR. RADELL: Okay.

3 THE COURT: You know how to do  
4 that, so does Mr. Krebs.

5 MR. RADELL:

6 Q. Are these constituents -- are the  
7 parameters tested for under 330 IAC 4 also the  
8 parameters that would be tested for under the  
9 hazardous waste and monitoring requirements of  
10 RCRA?

11 A. I believe some of them would be  
12 included, but there would be additional tests  
13 required for hazardous waste disposal.

14 Q. As a result of your inspection, did  
15 you conclude that you should refer this case,  
16 through a complaint for formal closure and  
17 post-closure?

18 A. Yes, I did.

19 Q. At the inspection you've said that  
20 you interviewed Mr. Hagen and asked him to  
21 demonstrate his compliance with RCRA. Did you  
22 keep any sort of form or actual recordings of  
23 his answers to your questions?

24 A. Yes.

1           Q.    I'm showing the witness the document  
2           which I have marked as Complainant's Exhibit  
3           Number Nine.   (Tendered.)

4                   MR. KREBS:   Number Nine, thank  
5           you.

6                   MR. RADELL:

7           Q.    Have you reviewed the documents?

8           A.    Yes, I have.

9           Q.    Isn't that the form that you filled  
10          out, based upon Mr. Hagen's answers to your  
11          questions?

12          A.    Yes.

13          Q.    Could you please state --

14                   MR. RADELL:   Well, Your Honor, I  
15          know that you're interested in  
16          getting this moved along.   Should I  
17          have him read through each violation  
18          that he observed and say that he  
19          indeed observed it and that he asked  
20          Mr. Hagen, or should I just introduce  
21          the document?

22                   THE COURT:   I think I would like  
23          to know how the form was prepared and  
24          at what point during the inspection,

1                   whether or not anyone else was  
2                   present and so on. I don't think you  
3                   need to go through each of the things  
4                   on it.

5                   MR. RADELL:

6                   Q. Did you prepare this form,  
7                   simultaneously, with your discussions with  
8                   Mr. Hagen?

9                   A. We prepared it near the end of our  
10                  inspection.

11                  Q. When you say we, who is we?

12                  A. Well, Mr. Thomas Russell also  
13                  accompanied me on this inspection.

14                  Q. All right. Was there anyone --

15                   THE COURT: Just a minute. Do  
16                   you need to hear something?

17                   MS. REPORTER: Yes.

18                   THE COURT: The public address  
19                   system in the room seems to go on and  
20                   off. Whatever you are doing, just  
21                   stay very close to the microphone and  
22                   you should continue doing so.

23                   MR. RADELL: Where should we  
24                   pick up again?

1 THE COURT: Let's hear the last  
2 question that you put after you --  
3 well, the answer involving Thomas.

4 MR. KREBS: All right.

5 Q. You've said that we prepared the  
6 report. Who other than yourself prepared the  
7 report?

8 A. I prepared the report. Mr. Russell  
9 also accompanied me during the inspection.

10 Q. All right. Was anyone other than  
11 yourself, Mr. Russell and Mr. Hagen at the  
12 inspection?

13 A. No.

14 Q. Okay. Could you please summarize  
15 what is contained -- well, you just explained  
16 what this is for. You filled this out shortly  
17 towards the end of the inspection. Where are  
18 the requirements for these various -- the  
19 requirements that are listed here, are those  
20 statutory requirements or regulatory  
21 requirements?

22 A. They are regulatory requirements  
23 found at 320 IAC 4, at the time of the  
24 inspection. Now it's 320 IAC 4.1.

1 MR. RADELL: Your Honor, I am  
2 prepared to have Mr. Warner individu-  
3 ally go through each count here and  
4 cite the applicable Indiana  
5 Administrative Code Regulation. Most  
6 of them are already set forth in the  
7 complaint to which this specific  
8 violation is also cited in the  
9 complaint. Do you want me to take  
10 the time to go through them all now?

11 THE COURT: Yes, I think so. If  
12 each of these is tied to a provision  
13 in the IAC, I would like to know what  
14 it is. I would also like to know  
15 whether this was prepared as  
16 Mr. Hagen watched or during the  
17 conversation, and did he see what you  
18 were doing and that sort of thing,  
19 before we get to the statutory tying  
20 in.

21 MR. RADELL:

22 Q. Did Mr. Hagen watch you fill this  
23 out?

24 A. Yes, he did. As I stated earlier, we

1 did this at the end of the inspection. We had  
2 already had general discussions concerning Gary  
3 Development's compliance with RCRA and State  
4 regulations; and I told Mr. Hagen that as a  
5 matter of formality, I would have to ask him  
6 each and every one of the questions on the  
7 form. And as I asked him, he responded to each  
8 question.

9 Q. And you marked this down as he  
10 answered?

11 A. Yes.

12 Q. Okay. Can you tell me which Indiana  
13 regulation requires general waste analysis on  
14 file for the waste received?

15 A. No, off the top of my head, no.

16 Q. Have you ever recorded this  
17 elsewhere?

18 A. Yes.

19 Q. When you recorded this, were you  
20 preparing this form with the Indiana  
21 regulations?

22 A. Yes.

23 THE COURT: Mr. Radell, are you  
24 offering Number Nine?

1 MR. RADELL: Yes, I would like  
2 to offer Number Nine -- I would like  
3 to move the Court to admit Number  
4 Nine into evidence.

5 THE COURT: Mr. Krebs.

6 MR. KREBS: I would object to  
7 the document, because the questions  
8 that have been asked related to it  
9 say that it is being offered into  
10 evidence as evidence of violations by  
11 this facility, and there is no  
12 foundation that this document  
13 reflects violations of state law.

14 THE COURT: Mr. Radell.

15 MR. KREBS: If that's the  
16 purpose it's being offered, which I  
17 think it is.

18 MR. RADELL: This is being  
19 offered for that purpose, to demon-  
20 strate these violations, based upon  
21 Mr. Warner's questioning of  
22 Mr. Hagen, Mr. Hagen's response to  
23 Mr. Warner and Mr. Warner's writing  
24 that down in this official document,



1 while Mr. Hagen was answering those  
2 questions.

3 THE COURT: Well, are we saying  
4 that the purpose is to demonstrate  
5 what Mr. Warner found during this  
6 inspection? Mr. Krebs.

7 MR. KREBS: Now, that I have no  
8 objection to, if that's the purpose  
9 the document is being offered; but  
10 that's not what counsel's prior  
11 statement was.

12 THE COURT: Well, the natural  
13 conclusion, based upon this, would be  
14 that the witness believed that  
15 everywhere he has checked no on this  
16 document, constitutes a viola- tion  
17 of the Indiana Code. That is the  
18 natural conclusion that follows from  
19 the proposition, that this document  
20 reflects the conditions that the  
21 witness found upon inspection on June  
22 17th, 1985. Now, if that's what this  
23 document is all about -- I think that  
24 that's what it looks like. Is that

1 right?

2 MR. RADELL: Right.

3 THE COURT: All right. That's  
4 the purpose of the offer.

5 MR. KREBS: We would continue  
6 our objection, because there's no  
7 limitation, I don't believe, on the  
8 offer. This witness has not been  
9 qualified to give opinions of law as  
10 to whether there have been violations  
11 of statutes or regulations. There's  
12 no qualifications of this witness at  
13 all bearing on the subject as to his  
14 physical -- things he's physically  
15 used or responses he got from  
16 Mr. Hagen. We have no objections to  
17 those specific parts of evidence, but  
18 we do ask of him to give an opinion  
19 as to what his opinion is of what the  
20 law says.

21 MR. RADELL: I do not intend to  
22 have Mr. Warner make the conclusions  
23 of law off that document that the  
24 Presiding Officer should make. This

1 is simply to set forth what he  
2 observed; and since this is the basis  
3 of the violations alleged in our  
4 complaint, I want him to set forth  
5 the facts which he observed and then  
6 the Presiding Officer will conclude  
7 as to whether they were indeed  
8 violations.

9 THE COURT: Well, I'm going to  
10 admit it as demonstrating what this  
11 witness saw while he was at the  
12 facility, as further reflecting his  
13 discussion with Mr. Hagen; and I  
14 think the testimony also indicates  
15 that Mr. Warner believed these each  
16 represented violation of the Indiana  
17 Code. I admit it for those purposes.

18 (Complainant's Exhibit No. 9 Admitted)

19 MR. RADELL: Since Mr. Warner  
20 has said that he is unable to recall,  
21 without the assistance of his  
22 previous recordings, which regula-  
23 tions form the basis for each of the  
24 requirements set forth in the

1 analysis, I would like to offer it  
2 for the purposes of refreshing his  
3 recollection only, just for him to  
4 look at; but I do not offer it into  
5 evidence.

6 THE COURT: And what is that?

7 MR. RADELL: It is -- I have a  
8 copy. (Tendered). It is just the  
9 recording that he told us he made,  
10 where he went through the regulations  
11 and wrote them down, just to refresh  
12 his own recollection, which regula-  
13 tions form the basis for each  
14 complaint.

15 THE COURT: And at what point  
16 did he do this?

17 MR. RADELL: At what point did  
18 you do this, was it just recently?

19 THE WITNESS: Last evening.

20 THE COURT: All right. You may  
21 refresh his recollection, yes.

22 MR. RADELL: Yes.

23 Q. The first requirement sets forth that  
24 general waste analyses be on file for wastes

1 received at the facility. Where is that found?

2 MR. KREBS: Objection, Your  
3 Honor. If the witness is going to  
4 use this document to refresh his  
5 recollection, the witness can look at  
6 the document and so refresh his  
7 recollection. What's going to happen  
8 here is, we're going to proceed to  
9 read this document into evidence.  
10 That's not refreshing one's recollec-  
11 tion.

12 MR. RADELL: Well, then it's a  
13 recording of -- a simultaneous  
14 recording of an event that he can no  
15 longer recollect.

16 MR. KREBS: It wasn't simultane-  
17 ous, Your Honor. He just said he did  
18 it last night.

19 MR. RADELL: He did it  
20 simultaneous --

21 THE COURT: Just a moment.  
22 Counsel will not talk to each other  
23 on this record. This witness has  
24 been qualified as an inspector for

1 the State. I presume one of the  
2 things he's inspecting for is  
3 violations of the State Code and  
4 Regulations. I see no reason why he  
5 can't tell us which regulation he was  
6 inspecting for as to each one of  
7 these individual items. I will allow  
8 his testimony. I don't think you  
9 need to read each one in. They are  
10 referred to by numbers, so I think  
11 you can short-cut it a bit by doing  
12 it by numbers.

13 MR. RADELL: Okay.

14 Q. For Roman Numeral I, for what  
15 regulations were you inspecting?

16 A. 320 IAC 4.1-16-4.

17 Q. And based upon your inspection, there  
18 was no general waste analysis on file for waste  
19 received?

20 A. Correct.

21 Q. Number II, what regulations were you  
22 inspecting for for Number II?

23 A. 320 IAC 4.1-16-4.

24 Q. And there was no general waste

1 analysis plan on file, based upon your  
2 observations?

3 A. Correct.

4 Q. And Number III?

5 A. 330 IAC 4, Section 14.

6 Q. And there were no State approvals on  
7 file?

8 A. Correct.

9 Q. I'm moving to Roman Numeral II (1),  
10 which regulation?

11 A. 320 IAC 4.1-17-3-and-5.

12 Q. And there were no internal  
13 communications functional at that time, based  
14 on your observations?

15 A. Correct.

16 Q. Number Two?

17 A. 320 IAC 4.1-17-3-5.

18 Q. And there were no telephone or  
19 two-way radios functional, based upon your  
20 observation?

21 A. Correct.

22 Q. Number three?

23 A. 330 IAC 4.1-17-3-5.

24 Q. And there were no emergency

1 equipment, including extinguishers, spill  
2 control and safety equipment functional, based  
3 upon your observations?

4 A. Correct.

5 Q. And Number Four?

6 A. 330 IAC 4.1-18-2.

7 Q. And there was no contingency plan on  
8 file, based upon your observations?

9 A. Correct.

10 Q. Moving to Roman Numeral III,  
11 Manifesting, Number One?

12 A. 320 IAC 4.1-19-2.

13 Q. And there were, based upon your  
14 observations, manifested shipments of -- well,  
15 excuse me, shipments of hazardous waste had  
16 been accepted that were not manifested?

17 A. Correct.

18 Q. Number Two?

19 A. 320 IAC 4.1-19-2.

20 Q. So based upon your observations,  
21 shipments of hazardous waste were accepted,  
22 without signed and dated manifest?

23 A. Correct. I'd like to qualify that  
24 answer, in that I was -- I did not look at any



1 manifest on the date of this inspection.

2 Mr. Hagen stated that he did have the manifest,  
3 but he couldn't bring them forth at that time.

4 MR. KREBS: I'm sorry, I didn't  
5 hear the last part.

6 THE WITNESS:

7 A. Mr. Hagen stated that he did have the  
8 manifest, but he didn't have them available at  
9 that time.

10 MR. RADELL:

11 Q. Did he state why he did not have them  
12 available for your inspection?

13 A. He simply couldn't find them.

14 Q. Did you inform Gary Development  
15 Company, before you went to inspect the  
16 facility, that you were going to inspect the  
17 facility?

18 A. No, we did not.

19 Q. You did not.

20 Under Manifesting Number Three, which  
21 regulations were you inspecting for there?

22 A. 320 IAC 4.1-19-2.

23 Q. And based upon your observations --  
24 well, you didn't see any manifest -- that there

1           were no manifest discrepancies addressed, based  
2           upon your observations?

3           A.     Correct. And that under that part of  
4           the inspection sheet, I was under regulation  
5           320 IAC 4.1-19-3.

6           Q.     Roman Numeral Number IV, the  
7           Operating Record, Number One?

8           A.     Number One and Two and Three are all  
9           included under 320 IAC 4.1-19-4.

10          Q.     And based upon your observations, the  
11          description and quantity of the waste received  
12          by the facility had not been noted?

13          A.     Correct.

14          Q.     And the date of the waste which was  
15          received from the date that the waste was  
16          disposed of had not been properly noted?

17          A.     Correct.

18          Q.     What about Number Three -- excuse me,  
19          did you say that was part of the part two?

20          A.     Yes.

21          Q.     So based upon your observations, the  
22          location and quantities of waste in each cell  
23          was not noted on a map or cross-referenced to a  
24          manifest document?

1 A. Correct.

2 Q. Moving to Roman Numeral Number V,  
3 Inspections. Under what regulations were you  
4 inspecting for, for Number One?

5 A. Number One, Two and Three are all  
6 included under Regulation 320 IAC 4.1-16-6.

7 Q. All right. And based upon your  
8 observations, Gary Development Company had not  
9 conducted inspections of emergency equipment?

10 A. Correct.

11 Q. And Gary Development Company had not  
12 conducted inspections of security devices?

13 A. Correct.

14 Q. And Gary Development Company did not  
15 maintain an inspection log, which contained the  
16 date and time and the inspector for each of the  
17 inspections?

18 A. Yes.

19 Q. Moving to Number VI, Security, Number  
20 Three, can you tell me what regulations you  
21 were inspecting for for that one?

22 A. 320 IAC 4.1-16-5.

23 Q. And based upon your observations,  
24 Gary Development Company did not have danger

1 signs posted where specified by the regulation?

2 A. Correct.

3 Q. Turning to page two, under Operating  
4 Requirements, Number Two, can you tell me what  
5 inspection regulation that was under?

6 A. 320 IAC 4.1-28-2.

7 Q. And based upon your observations, run  
8 off from the active portion of the landfill was  
9 not collected?

10 A. Correct.

11 Q. Okay. Mr. Warner, you stated that  
12 you made two other inspections in the Gary  
13 Development Company facility. When was the  
14 second such inspection?

15 A. On August 22nd, 1986.

16 Q. And did you prepare any sort of memo  
17 to your file concerning that inspection?

18 A. Yes, I did.

19 Q. Okay. I'm showing the witness what  
20 I've marked as Complainant's Exhibit Number 17.  
21 (Tendered).

22 Mr. Warner, is this the memo which you  
23 prepared for your file, based upon your  
24 inspection at the facility on November --

1 August 22nd, 1986?

2 A. Yes, it is.

3 Q. Does this memorandum accurately  
4 reflect the observations you made at your  
5 inspection?

6 A. Yes, it does.

7 MR. RADELL: I would like to  
8 move that this be admitted into  
9 evidence.

10 THE COURT: Mr. Krebs.

11 MR. KREBS: Could I have just a  
12 moment, Your Honor?

13 THE COURT: Certainly.

14 MR. KREBS: No objection.

15 THE COURT: Number 17 is  
16 admitted.

17 (Plaintiff's Exhibit No. 17 Admitted)

18 MR. RADELL:

19 Q. Could you briefly summarize what  
20 happened at that inspection, as reported in  
21 your summary?

22 A. Mr. Hagen was not there at the  
23 facility the date of this inspection, and I did  
24 not go all through the facility and I did not

1 review records on that date. I did later that  
2 date telephone Mr. Hagen and inquire about his  
3 status as a RCRA facility, and he again stated  
4 that he did not wish to be within the system  
5 and that he was meeting with EPA representa-  
6 tives, trying to resolve the matter.

7 Q. Did Mr. Hagen discuss whether the  
8 facility had remedied any of the violations  
9 which you have noted in your last inspection?

10 A. He stated that no conditions had  
11 changed.

12 Q. Okay. Thank you.  
13 When was the third inspection that you made?

14 A. On August 27th, 1987.

15 Q. Did you have any memoranda, marked  
16 inspection report from that inspection?

17 A. No, I do not.

18 Q. Could you explain what happened at  
19 that inspection?

20 A. Mr. Jonathan Cooper of Region V,  
21 U. S. EPA, a geologist, and I inspected the  
22 Gary Development facility. The facility was  
23 represented by Mr. Hagen and a Dr. West, and we  
24 had a discussion concerning his compliance with

1 RCRA and State statutes and regulations; and,  
2 again, he stated that he had not done any work  
3 to change his compliance at the facility; and  
4 we conducted a brief tour of the facility.

5 Q. Had any of the violations -- well,  
6 any of the conditions which you had inspected  
7 at prior inspections been changed, so that you  
8 would change your inspection, your previous  
9 inspection reports?

10 A. No.

11 Q. Why don't you have a written report  
12 concerning this last inspection?

13 A. I have not received it back from our  
14 Indianapolis office, where I send all of my  
15 documents when I dictate my field trip reports.

16 Q. All right.

17 MR. RADELL: I would like to  
18 offer to the Court to submit that  
19 document, once it is prepared, to  
20 supplement the record, if the Court  
21 deems it necessary.

22 THE COURT: Well, it's not a  
23 question of whether I think it's  
24 necessary. When you get it back, if

1                   you want to offer it, you may then  
2                   offer it. What kind of time are we  
3                   talking about, Mr. Warner?

4                   THE WITNESS: I believe next  
5                   week, possibly the end of this week.

6                   THE COURT: You may offer it  
7                   when you get it back.

8                   MR. KREBS: I don't know whether  
9                   we'll have an objection to it or not.

10                  THE COURT: Well, yes, nobody  
11                  has seen it yet. You'll have an  
12                  opportunity to object.

13                  MR. KREBS: We may have to, I  
14                  don't know.

15                  THE COURT: We'll see.

16                  MR. RADELL: All right. I'm  
17                  through with this witness.

18                  THE COURT: Very well -- oh,  
19                  boy, I have 1:35. Is that right?

20                  MR. KREBS: Yes.

21                  THE COURT: Well, I know,  
22                  Mr. Krebs, that you are a devoted  
23                  eater of lunch.

24                  MR. KREBS: I try to remain



1 quiet on that issue.

2 THE COURT: I think it's time to  
3 have lunch. I was going to say that  
4 we will either finish this witness or  
5 we will break now for lunch; but we  
6 haven't been going for very long, as  
7 everyone knows. Mr. Krebs, what do  
8 you want to do, lunch now or when you  
9 finish cross?

10 MR. KREBS: I think I would  
11 prefer to have lunch. I have no  
12 objection to making it fairly short,  
13 assuming we can go someplace across  
14 the street.

15 THE COURT: I will let it be --  
16 you want to do it now, though?

17 MR. KREBS: Yes, I would prefer  
18 that. Otherwise, we're going to be  
19 eating perhaps 2:00, 2:30. It may  
20 defeat the purpose.

21 THE COURT: I suspect that you  
22 meant make lunch short, not cross-  
23 examination?

24 MR. KREBS: Yes, lunch. I would

1 prefer to break for lunch. It's your  
2 discretion, but I would prefer to  
3 break for lunch.

4 THE COURT: We will have lunch,  
5 but let's make it -- let's try 40  
6 minutes. That will take us to a  
7 quarter after 2:00. Very well, lunch  
8 recess.

9 MR. KREBS: Thank you.

10 MR. RADELL: Thank you.

11 (Proceedings Recessed for Lunch and Cont'd)

12 THE COURT: Back on the record,  
13 please. Mr. Krebs.

14 MR. KREBS: Thank you, Your  
15 Honor.

16 C R O S S - E X A M I N A T I O N

17 BY MR. KREBS

18 Q. Mr. Warner, you were discussing your  
19 educational background briefly, and I had just  
20 a couple of questions there. In your courses,  
21 I believe you said at Indiana University --

22 A. No.

23 Q. I'm sorry. Where?

24 A. Indiana State University.

1 Q. Indiana State in Terre Haute?

2 A. Yes.

3 Q. Okay. In your school, was that a,  
4 what, B. S. Degree, Bachelorate of Science?

5 A. Yes.

6 Q. Okay. In your -- did you take any  
7 work after that, any Master's work or --

8 A. No.

9 Q. Okay. In your courses at Indiana  
10 State University for your B. S. Degree, did you  
11 take any courses in chemistry?

12 A. Yes, I did.

13 Q. Did you take any courses, specifical-  
14 ly, in organic chemistry?

15 A. Yes, I did.

16 Q. Okay. How many courses did you have  
17 in chemistry?

18 A. Two.

19 Q. Two. And one would be what, like  
20 basic organic chemistry?

21 A. I can't recall it at this time, one  
22 was organic.

23 Q. One was what?

24 A. I cannot remember the other title of

1           that course.

2           Q.     Okay. You indicated you have some --  
3           I think other training in leachate and that  
4           kind of thing. Have you ever attended any --  
5           like groundwater analyses courses, like the  
6           ones offered by Gary Miller -- Dave Miller puts  
7           on?

8           A.     No.

9           Q.     Have you ever attended any put on by  
10          Dr. Beranek (phon.) of the IC Bar?

11          A.     Yes.

12          Q.     Would that be very recently?

13          A.     Yes.

14          Q.     Would that be the one given about two  
15          weeks ago?

16          A.     No.

17          Q.     Okay. How long ago would it have  
18          been?

19          A.     A year, approximately.

20          Q.     A year. You were talking about the  
21          landfill, of Gary Development testing for  
22          certain types of chemical constituents in its  
23          four monitoring wells; and I believe you  
24          mentioned 330 IAC 4 parameters.

1 Can you recall basically what those are,  
2 what parameters those would be?

3 A. No, I can't.

4 Q. Okay. Do you know whether that would  
5 include things such as chloride, sodium,  
6 ammonia? Any of those items ring a bell?

7 A. That does sound familiar, yes.

8 Q. Okay. In analyzing leachate from any  
9 type of waste disposal facility that has  
10 disposed of municipal waste, would you agree  
11 that the first indicators of any leachate  
12 problems or problems with the leachate would be  
13 the inorganic chemicals, rather than the  
14 organic?

15 A. I don't believe I would be qualified  
16 to answer that.

17 Q. I see. You don't really know?

18 A. No.

19 Q. Are the chlorides and sodiums things  
20 that you think were tested under 330 IAC 4, are  
21 those the organic or inorganic chemicals or do  
22 you know?

23 A. Those would be the organic, I  
24 believe.

1 Q. The organic?

2 A. No, excuse me, inorganic.

3 Q. You think they are --

4 A. Inorganic.

5 Q. -- inorganic. The area on site that  
6 you were -- or the area that you were calling  
7 the leachate pond, were you talking about  
8 something physically located on the landfill  
9 facility site; is that correct?

10 A. Yes.

11 Q. When you inspected the facility --  
12 was it three occasions?

13 A. Yes.

14 Q. Okay. On any of the three occasions  
15 that you inspected the facility, did you ever  
16 notice discolored liquid flowing onto the  
17 landfill facility, specifically in the area of  
18 its northwest corner, from neighboring  
19 manufacturing company known as Vulcan  
20 Materials?

21 A. I might have, yes, the first visit.

22 Q. Was that -- could that be the one  
23 where, when were you out there, there was a  
24 Mr. Jones, a geologist from the DEM, Department

1 of Environmental Management, with you?

2 MR. RADELL: Objection, Your  
3 Honor. This is well beyond the scope  
4 of the direct examination, and  
5 there's no foundation for any of  
6 this. We don't know where it's  
7 leading or for what purpose he's  
8 bringing it out.

9 THE COURT: Mr. Krebs.

10 MR. KREBS: Your Honor, I'm just  
11 asking about the inspections, the  
12 three inspections; and who was with  
13 him on inspections and what else he  
14 observed. You know, he said he's  
15 been out there three times, and that  
16 was his direct examination.

17 MR. RADELL: But on direct  
18 examination, he didn't refer to any  
19 leachate coming from off site or --  
20 and I asked him during direct who was  
21 with him, and he already stated who  
22 was with him.

23 THE COURT: All right. I think  
24 it's improper. In the first place,

1           it may serve to test the witness'  
2           recollection of the inspection and  
3           what was going on; and, furthermore,  
4           if the leachate was coming from  
5           someplace else, that certainly is  
6           worthy of explanation. Continue.

7           MR. KREBS: Thank you.

8           Q. And I think my last question was --  
9           and this may not be the exact question -- but,  
10          basically, on any of those inspections was  
11          there a Mr. Jones from DEM, Department of  
12          Environmental Management, with you?

13          A. I do not recall.

14          Q. Okay. In your years of experience on  
15          looking at water, have you ever had a situation  
16          where you observed discolored water that would  
17          be natural flowing groundwater, that would be  
18          discolored because it had iron in it?

19          A. Yes.

20          Q. Is that a fairly frequent occurrence  
21          in the State of Indiana, water with a lot of  
22          iron and discoloration in it?

23          A. I don't think I would be qualified to  
24          answer that.



1           Q.    Okay.  Let me ask you this, to be  
2           more fair in the question.  How many times have  
3           you observed liquid, which would be natural  
4           flowing groundwater within the State of  
5           Indiana, that would be discolored because of  
6           iron, in your opinion?

7           A.    A few times I have seen it, yes.

8           Q.    When you say a few, a half dozen,  
9           more or less?

10          A.    Possibly more -- possibly more.

11          Q.    Okay.  Would you agree that water  
12          that's discolored due to iron is not leachate?

13          A.    Possibly, yes.

14                   MR. RADELL:

15          Q.    Excuse me.  Did you say possibly it  
16          is; or possibly, yes, you would agree that it  
17          is not?

18          A.    Possibly it's not leachate.

19                   MR. KREBS:

20          Q.    On the -- this is just a point of  
21          clarification.  On your exhibit -- I'm not sure  
22          that you have it there -- Exhibit Number Nine,  
23          Plaintiff's Exhibit Nine, which is your  
24          intended inspection report of June 17th, 1985,

1           where you check the yeses and nos, is it your  
2           testimony that these yeses and nos were based  
3           solely upon Mr. Hagen's responses to the  
4           questions; or was any of it based upon your --  
5           partially upon your subjective opinion, as  
6           well?

7           A.     It was based upon his answers.

8           Q.     Okay.  So, nothing in here is, in  
9           your opinion, subjective upon your part?

10          A.     No.

11          Q.     Okay.  Do you have that in front of  
12          you, by chance?

13          A.     Yes.

14          Q.     Okay.  On the bottom of Roman Numeral  
15          VI, under Security, on line one, where it says  
16          "or artificial barrier," can you explain to me  
17          what that means?

18          A.     Fencing.

19          Q.     Okay.  So we're talking about fencing  
20          around the site or around the facility?

21          A.     Yes.

22          Q.     Okay.  So you're saying that this  
23          facility has fencing around it?

24          A.     Yes.

1           Q.    Okay.  As far as the 24-hour  
2           surveillance, did you ever personally note that  
3           yourself?

4           A.    No, I did not.

5           Q.    Okay.  That's what Mr. Hagen told  
6           you?

7           A.    Yes.

8           Q.    Okay.  Did you ever, on any of your  
9           three inspections, did you ever notice any  
10          security-type employees?

11          A.    Could you define security-type  
12          employees.

13          Q.    Well, somebody that would appear to  
14          be checking gates, checking trucks, checking  
15          locks?

16          A.    Yes.

17          Q.    Okay.  The second item, controlled  
18          entry onto the site, can you explain just what  
19          you mean by that?

20          A.    There was actual physical control  
21          onto the site; and at this facility, there was  
22          a gate house that everyone had to go by and  
23          that was -- it was manned by an employee.

24          Q.    Okay.  There was a gate house, by

1           your observations, that's manned by an employee  
2           of the facility?

3           A.     Correct.

4           Q.     And everybody has to go by there and  
5           stop, I suppose?

6           A.     Correct.

7           Q.     Okay.  Would that include you, when  
8           you go on the site?

9           A.     Yes.

10          Q.     Okay.

11                   MR. RADELL:  Could I redirect?

12                   THE COURT:  Oh, are you through?

13                   MR. KREBS:  I haven't finished  
14           yet.

15                   MR. RADELL:  Oh, I'm sorry.

16                   MR. KREBS:  Just a long pause.

17                   THE COURT:  I thought he would  
18           let us know when he was finished.

19                   MR. KREBS:

20           Q.     You were discussing waste for the  
21           USS Lead, and that's when you were discussing  
22           your working knowledge.  Have you reviewed any  
23           documents generated by USS Lead that would  
24           specifically say they generated RCRA waste

1 which was disposed of at Gary Development?

2 A. No.

3 Q. But you have reviewed that company's  
4 records?

5 A. Yes.

6 Q. Okay. So they have no records  
7 showing what we would probably call manifest or  
8 some type of record, showing that they shipped  
9 waste -- RCRA waste to Gary Development, to  
10 your knowledge?

11 A. I'm not sure.

12 Q. Okay. But the records you reviewed  
13 did not indicate that they had shipped waste to  
14 Gary Development?

15 A. Correct.

16 Q. If they had shipped RCRA waste to  
17 Gary Development, is USS Lead required by law,  
18 in your opinion, if you have one, to manifest  
19 such waste after November of 1980?

20 A. Yes.

21 Q. Did you ever ask any officials of USS  
22 Lead whether they had sent RCRA waste  
23 unmanifested to Gary Development Company?

24 A. No.

1 Q. To your knowledge -- well, let me  
2 strike that. Strike that.

3 Your inspection area, I'm assuming by your  
4 responses to the questions, that could include  
5 the USS Lead facility?

6 A. Yes.

7 Q. Okay. And how long have you -- did  
8 you say you had inspected -- that you had been  
9 going to that facility?

10 A. Since 1983, I believe.

11 Q. '83. Are they still in business?

12 A. No, they're not.

13 Q. Do you know how long they've been out  
14 of business?

15 A. Possibly a little more than a year,  
16 maybe more.

17 Q. Okay. Based upon your inspection of  
18 that facility and being an employee of the  
19 Indiana Department of Environmental Management,  
20 have there been any, to your knowledge,  
21 enforcement actions taken against USS Lead for  
22 disposing of RCRA waste without manifest?

23 A. Yes.

24 Q. And would that include the Gary

1 waste, the waste that you're alleging went to  
2 Gary Development?

3 A. It would be the same type of waste,  
4 yes.

5 Q. Okay. My question is, though, are  
6 any allegations against USS Lead? Did they  
7 specifically -- are they specifically citing  
8 USS Lead for shipping for disposal unmanifested  
9 RCRA waste, specifically to Gary Development,  
10 to your knowledge?

11 A. No.

12 Q. But there are, and to your knowledge  
13 of the charges you know against that company,  
14 there are allegations that they have manifested  
15 waste without -- or that they had shipped waste  
16 for disposal without manifest to other places?

17 A. No.

18 Q. There are not? Maybe I'm confused.  
19 Are you saying -- then you're not -- there are  
20 no charges at all pending against USS Lead for  
21 manifesting waste without -- or for shipping  
22 waste without a RCRA manifest?

23 A. Correct.

24 Q. There are not --

1 A. Correct.

2 Q. There are not any, to your knowledge?

3 A. Correct.

4 Q. Okay. Did you do any inspections  
5 under what you would call RCRA inspections, in  
6 this facility before 1985?

7 A. Which facilities, sir?

8 Q. Gary Development.

9 A. No.

10 Q. Okay. And were you an inspector in  
11 this area since, what, 1983?

12 A. Correct -- well, no, since 1973.

13 Q. Since 1973?

14 A. Correct.

15 Q. Not under RCRA, then?

16 A. No, sir.

17 Q. Okay. And have you been inspecting  
18 under RCRA since what, 1980 or 1981?

19 A. No, sir.

20 Q. When did you begin doing that?

21 A. 1983.

22 Q. 1983. The early '83, late '83 or  
23 what part of '83?

24 A. Mid '83.



1 Q. Mid '83. But the first time you  
2 inspected Gary Development under RCRA would  
3 have been mid '85?

4 A. Correct.

5 Q. Was the site inspected by -- the Gary  
6 Development site, was it inspected by other  
7 inspectors for the Department of Environmental  
8 Management or Environmental Management Board,  
9 State Board of Health, prior to your  
10 inspections of '85 under RCRA?

11 A. No.

12 Q. Who determined within the State  
13 agency in 1985 that Gary Development should be  
14 inspected under the Resource Conservation and  
15 Recovery Act criteria? Was that your decision  
16 or was that somebody else's decision?

17 A. Someone elses.

18 Q. Do you recall who that would have  
19 been?

20 A. No, I don't.

21 Q. Based upon the hierarchy of reporting  
22 within the Agency and during the time of 1985,  
23 do you have an opinion as to who it probably  
24 would have been, who had ordered this site to

1 be inspected?

2 A. No, I don't. May I clarify?

3 Q. Sure.

4 A. I'm simply given a computer printout  
5 of the facilities I need to inspect by quarter,  
6 and I do work out of the LaPorte office. So,  
7 I'm not in Indianapolis and I'm not privy to a  
8 lot of inner office discussions on things like  
9 that.

10 Q. So, you get a computer printout,  
11 indicating basically your assignment. Is that  
12 on a monthly basis or --

13 A. Weekly.

14 Q. Weekly basis. And you're not really  
15 sure how those items get on the printouts, is  
16 that what you're saying?

17 A. I know now, how we're doing it now;  
18 but at that time I wasn't aware of how they  
19 were put on.

20 Q. At that time would be between when  
21 and when, '83 to --

22 A. '86.

23 Q. Until '86, into '86?

24 A. Yes.

1           Q.    Since you're not sure about how the  
2           site came to be inspected, except that you were  
3           informed by some type of printout or whatever  
4           to go there and inspect it under RCRA, would  
5           that also mean that -- and correct me if I'm  
6           wrong -- but would that also mean that you  
7           personally would not know why the State would  
8           have not taken any action to have this site  
9           declared a RCRA site between 1980 and 1985 or  
10          '86?

11          A.    Not necessarily, no.

12          Q.    You're saying you wouldn't have that  
13          information?

14          A.    Oh, I did, once I started my  
15          inspection procedures.

16          Q.    Okay. And why was that, then?

17          A.    Could you -- I'm not -- I don't  
18          understand.

19          Q.    Okay. Let me ask it -- I thought  
20          your answer would be no, based upon your prior  
21          answer. But let me just ask the question and  
22          see what your answer is, directly.

23                Was there any reason, to your knowledge,  
24          why the State of Indiana -- whether it's the

1 Environmental Management Board, the predecessor  
2 of the present Department of Environmental  
3 Management and Solid Waste Management Board --  
4 was there any reason why there was no action  
5 filed between November of 1980, in fact, ever  
6 in the State of Indiana todate, to declare this  
7 site to be a RCRA facility?

8 A. I could only offer my own opinion,  
9 and that would be that there was a lack of  
10 staffing at the time.

11 Q. A lack of staff. Are you familiar  
12 with the case that I discussed this morning,  
13 which is called N-53, where in February of 1983  
14 Gary Development and the Department -- or the  
15 Environmental Management Board entered into a  
16 lengthy consent order, an agreement, as to its  
17 operations?

18 A. I read that prior to the inspection  
19 in 1985.

20 Q. Okay. So you read that. Would you  
21 agree that that's a fairly technical type of  
22 document, fairly encompassing on operations of  
23 the sites, from your review?

24 A. At this time I don't have an opinion.

1 I haven't reread it before this proceeding.

2 Q. Would you agree that it appears, at  
3 least in 1983, the State of Indiana had  
4 staffing available to work on situations at  
5 Gary Development?

6 A. Possibly from a solid waste aspect,  
7 but not from the hazardous waste aspect.

8 Q. Okay. It's the same agency, is it  
9 not, in the State of Indiana that does both of  
10 those items, solid waste and RCRA hazardous  
11 waste, correct?

12 A. Correct.

13 Q. It's presently the same Commissioner,  
14 the Department of Environmental Management?

15 A. Correct.

16 Q. Okay. And is it correct that the  
17 Indiana Solid Waste Management Board handles  
18 both issues?

19 A. I believe so.

20 Q. Okay. There's nobody -- RCRA waste  
21 and solid waste are handled by that Board and  
22 not by somebody else or by the Air Board or  
23 Water Pollution Control Board, correct?

24 A. I believe so, but I'm not absolutely

1           sure.

2           Q.    Would you agree that if the site, if  
3           Gary Development's site is not a RCRA site,  
4           then it need not comply with any of the items  
5           which you have discussed in connection with  
6           Exhibit Number Nine, your inspection report?

7           A.    I believe that it still would be  
8           required -- well, if it wasn't accepting  
9           hazardous waste, it wouldn't have to have the  
10          special waste approvals. I believe I could  
11          answer yes to that question.

12          Q.    Okay. So all these things that you  
13          went through on the citations wouldn't apply,  
14          if it's not a RCRA facility? These are just  
15          RCRA facilities?

16          A.    Basically, yes.

17          Q.    We were discussing -- I think you say  
18          you saw a sheen on water, maybe this was in a  
19          leachate pond, some type of sheen.

20          A.    Correct.

21          Q.    Have you ever, in your observations  
22          of doing inspections since the 70's for various  
23          purposes, have you ever seen sheen on water  
24          caused by such things like soot from diesel

1 engines, which are releasing hydrocarbons into  
2 the atmosphere? Have you ever noticed that  
3 occurring?

4 A. I could have. I'm not aware of it.

5 Q. What kind of equipment does Gary  
6 Development use?

7 A. Craning equipment.

8 Q. Mainly diesel equipment?

9 A. I couldn't tell you.

10 Q. Have you ever noticed sheens on water  
11 waves caused in different parts of the year by  
12 the decay of vegetation, such as leaves?

13 A. It could, possibly, yes.

14 Q. An employee with the State in the  
15 Environmental, what's called Agency, have you  
16 ever known an employee by the name of Rob  
17 Downey, a geologist?

18 A. Yes.

19 Q. Staff. Have you ever worked with  
20 him?

21 A. I can't recall ever going on any  
22 projects with him.

23 Q. Did you ever hear, as part of your  
24 job with the Agency, that Mr. Downey had

1 inspected a facility, whatever, perhaps  
2 Northside Landfill or some facility in Indiana,  
3 and thought something was leachate and as a  
4 geologist; and it turned out he tested it, and  
5 it wasn't leachate at all?

6 MR. RADELL: I think we're well  
7 beyond the scope of the direct  
8 examination now. We're discussing  
9 the facts of other cases.

10 THE COURT: Well, I don't think  
11 so. I remember distinctly saying to  
12 Mr. Krebs that he could pursue the  
13 leachate matter on cross-examination.  
14 Now, you raised it on direct; and  
15 it's perfectly reasonable for counsel  
16 to explore the subject.

17 THE WITNESS:

18 A. No.

19 MR. KREBS:

20 Q. I would call your attention to one of  
21 the exhibits that have been sponsored into  
22 evidence, specifically -- if I can find the  
23 right one -- the memorandum of July 29th, 1985,  
24 which I believe is Number 11. Do you have



1           that?

2           A.     Yes.

3           Q.     Turn to the second page, if you  
4           would, third paragraph. You have a sentence  
5           discussing this leachate collection pond that  
6           you've previously testified to. Did you find  
7           that?

8           A.     Yes.

9           Q.     As being discolored?

10          A.     Yes.

11          Q.     And it says here that, after you  
12          mention that, that it's discolored, that we  
13          asked Mr. Hagen if that liquid had been  
14          analyzed, and he stated that it had not been  
15          sampled. Is that a true statement?

16          A.     Yes.

17          Q.     And also -- I think you've already  
18          testified that you didn't take any sample?

19          A.     Correct.

20          Q.     No one with you, to your knowledge,  
21          took any sample?

22          A.     Correct.

23          Q.     The first paragraph -- I'll try to  
24          hit several items on this document, even though

1           they may not be totally related; so we don't  
2           have to switch back and forth through the  
3           documents, if possible. The first paragraph,  
4           you state on the second line, Mr. Hagen had  
5           been informed by an EPA attorney that Gary  
6           Development did not have interim status. Did  
7           he tell you what attorney had told him that?

8           A.    He possibly did, but I don't recall a  
9           name.

10          Q.    Okay. Back to the third paragraph,  
11           it says a complaint -- well, let me read it --  
12           a complaint would have to be filed and the  
13           complaint would ask for a formal closure of the  
14           facility. In connection with your statement  
15           there, who was going to file this complaint  
16           that you're talking about, EPA or the State of  
17           Indiana?

18          A.    That -- let me clarify that. That  
19           was not my statement.

20          Q.    Okay. Well, whose statement is it?

21          A.    That's Mr. Russell's.

22          Q.    Mr. Russell's statement. Okay, so  
23           Mr. Russell was wanting to file a complaint?

24          A.    If I might further clarify,

1 Mr. Russell at that time was the Section Chief  
2 for our Enforcement Section. He had all the  
3 enforcement action --

4 Q. For the State?

5 A. -- for Hazardous Waste Management  
6 Branch.

7 Q. For the State of Indiana?

8 A. Yes.

9 Q. Okay. Okay, well, who was he going  
10 to file a complaint with, the Environmental  
11 Management Board?

12 A. At that time he did not indicate  
13 either way.

14 Q. Okay. The next paragraph, it says,  
15 "I will prepare an enforcement referral."  
16 Would that be his statement also, Mr. Russell's  
17 statement?

18 A. No, that is mine.

19 Q. Okay. That's your statement?

20 A. Yes.

21 Q. Who did you prepare the enforcement  
22 referral to? Did you send it to Ralph Pickard  
23 or who did you send it to?

24 A. No, to our Enforcement Section.

1 Q. Which would be who at that time?

2 A. Mr. Russell was the Section Chief,  
3 and he took that case. He handled that case  
4 himself.

5 Q. Okay. So, but you're the one that  
6 prepared the referral?

7 A. To him.

8 Q. Gave it to Mr. Russell?

9 A. Yes.

10 Q. And what did he do with it?

11 A. I believe he added some additional  
12 information and forwarded it to EPA through  
13 Mr. Doyle's signature.

14 Q. Through Mr. Doyle?

15 A. Yes.

16 Q. He didn't send it to Mr. Pickard, the  
17 Technical Secretary of the Indiana Environment-  
18 al Management Board?

19 A. There very well might be a review  
20 process that the Enforcement Section goes  
21 through; but since I don't work there, I'm not  
22 familiar with it.

23 Q. The first page of this document, the  
24 last paragraph, the one that has the brackets

1           around it, is this your statement or is this  
2           somebody else's statement, this portion of the  
3           memorandum (indicating)?

4           A.     That is mine.

5           Q.     Okay. Now, you indicate the final  
6           area of importance discovered during the filed  
7           audit is the existence of an Environmental  
8           Management Board complaint, Cause Number N-146.  
9           Okay, what do you mean by that? What kind of  
10          complaint, a complaint that's a complaint  
11          against Gary Development?

12          A.     Correct.

13          Q.     So, is it your opinion that N-146 was  
14          an enforcement type of action by the Indiana  
15          Environmental Management Board against Gary  
16          Development?

17          A.     Yes.

18          Q.     And the second line says this  
19          document -- now, you're talking about this  
20          complaint, is that what you mean?

21          A.     Yes.

22          Q.     -- reveals the solid waste history of  
23          Gary Development Landfill and the problems and  
24          violations that are yet to be resolved. That's

1 your statement also?

2 A. Correct.

3 MR. KREBS: I need to look for a  
4 document, Your Honor, that will just  
5 take me a minute here.

6 Q. Mr. Warner, I'd like to hand you a  
7 document which is entitled Recommended Findings  
8 of Facts/Conclusions of Law and Order of the  
9 Administrative Law Judge, in Cause Number  
10 N-146; entitled Gary Development Company, Inc.,  
11 Petitioner, versus Indiana Department of  
12 Environmental Management, Respondent. Have you  
13 ever seen that document before, issued by Judge  
14 Garrettson of the Environmental Management  
15 Board in September of 1986?

16 A. No, I have not.

17 Q. I suppose the answer is gonna be no  
18 to this. But are you aware that the Cause  
19 Number N-146, that you've referenced in your  
20 memorandum was an enforcement action, was not  
21 at all an enforcement action by the State  
22 against Gary, but in fact was a case by which  
23 Gary was suing the State?

24 A. No.

1           Q.    Were you ever aware, in reviewing  
2           your records and doing your audit, which you  
3           indicated you were doing and found some  
4           complaint, that in Cause Number N-146, what had  
5           happened was the State of Indiana had revoked  
6           Gary's authority to dispose of certain what  
7           they call special waste, including the waste  
8           involved in this case of the steel company,  
9           Jones and Laughlin; and Gary had appealed,  
10          timely appealed those decisions?

11          A.    No.

12          Q.    You weren't aware of that?

13          A.    No.

14          Q.    Why did you think Cause Number N-146  
15          was an enforcement action?

16          A.    Just from the reading of the  
17          document.

18          Q.    And you think you read something  
19          called a complaint, is that right?

20          A.    Correct.

21          Q.    You indicate in there, in that same  
22          paragraph, that second line, that after you  
23          talked about N-146, that that document --  
24          whatever you looked at -- discussed problems

1 and violations that are yet to be resolved at  
2 the site. In connection with that statement --  
3 if I can find the document -- well, let me ask  
4 you this.

5 Were you ever aware that between September  
6 of 1984 and November of 1985 the State of  
7 Indiana, Department of Environmental  
8 Management, now previously called the Board of  
9 Health Environmental Management Board,  
10 inspected Gary's facility on 21 occasions  
11 during that time frame and rated them  
12 acceptable 90 percent of the time?

13 A. No, I'm not.

14 Q. Did you ever inspect facilities  
15 yourself, fill out the inspection forms, where  
16 you inspected the facility under the solid  
17 waste management type of regulations?

18 A. No.

19 MR. KREBS: If I can have a  
20 moment, I think I'm about finished  
21 up. I'm just checking my notes, Your  
22 Honor.

23 Q. The waste that has been alleged in  
24 this case to be RCRA waste disposed of at Gary



1 Development's facility -- I think there are  
2 three different companies, USS Lead, Jones and  
3 Laughlin, I think it's called LTV Steel or  
4 whatever it is now, and American chemical -- do  
5 you know where on the 62 acres of the facility  
6 that waste was disposed of, allegedly disposed  
7 of?

8 A. I only know where Mr. Hagen indicated  
9 the waste had been placed.

10 Q. Okay. And what did he tell you?

11 A. He simply pointed to an area and he  
12 said this is where the waste was placed.

13 Q. Okay. Where was that, north, south,  
14 east?

15 A. I'd say the northeast side of the  
16 fill.

17 Q. Northeast side of the fill?

18 A. Uh-huh.

19 Q. Would that be up where what's called  
20 the Admixture Plant?

21 A. Somewhere up in there, yeah.

22 Q. It's got kind of a factory looking  
23 building up there --

24 A. Yes.

1           Q.    -- produce what they call admixture.  
2           So you think it would be in that area?

3           A.    Yes.

4           Q.    Is that an area, based upon your  
5           inspection of the site, that appears to have  
6           been covered with a final type cover for a long  
7           period of time?

8           A.    At what point in time are you  
9           referring to?

10          Q.    Well, let's say since at least 1985,  
11          when you began inspecting this site?

12          A.    I would believe it had been, had fill  
13          placed over it, yes.

14          Q.    Okay.  Is it a hard type of material?  
15          Are you familiar with --

16          A.    What would be your definition of a  
17          hard type?

18          Q.    Well, explain to me what the material  
19          appears to be to you, how about that?

20          A.    Some type of a clay and general  
21          refuge fill.

22          Q.    Have you noticed any disposal in that  
23          particular area, since your inspections  
24          beginning in 1985 todate?

1 A. Yes.

2 Q. In the northeast corner?

3 A. Yes.

4 Q. How close to the Admixture Plant?

5 A. Approximately -- on the 27th of  
6 August, we were just there. They are not  
7 working in that specific area; they were  
8 working more to the west. So that would be 600  
9 yards or so, approximately. They're not  
10 working presently at the area that Mr. Hagen  
11 indicated in 1985.

12 Q. The area where that waste was  
13 allegedly disposed of?

14 A. Correct.

15 Q. So the area you've seen, where waste  
16 has been disposed of since '85, would be  
17 approximately 600 yards away from the area  
18 where he described this waste had been  
19 disposed?

20 A. That is where they are actively  
21 filling as of August 27th.

22 Q. Okay. Would that be 600 yards to  
23 what direction, the west?

24 A. It would be to the west.

1 Q. Do you have Exhibit 17?

2 A. Yes.

3 Q. The last paragraph says, "In light of  
4 the position of Mr. Hagen, regarding GDCI, my  
5 only action available is to resubmit the same  
6 enforcement referral used for the June 17th,  
7 1985 inspection." Is this your statement,  
8 Mr. Russell's statement or Mr. Hunt's  
9 statement?

10 A. That's mine.

11 Q. And who did you resubmit the  
12 enforcement referral to?

13 A. Mr. Russell.

14 Q. And what did he do with it?

15 A. I believe he forwarded it to  
16 Region V, U. S. EPA.

17 Q. Mr. Warner, I have here a letter  
18 dated September 13th, 1983, from Ralph C.  
19 Pickard, Technical Secretary of the Indiana  
20 Environmental Management Board, to the  
21 Honorable Linley E. Pearson, Attorney General  
22 in the State of Indiana, regarding possible  
23 enforcement action against Gary Development.  
24 Were you ever aware of this occurring?

1 MR. RADELL: May I see a copy of  
2 that letter, please?

3 MR. KREBS: Yeah. I'll give it  
4 to you as soon as I can. That's the  
5 only one I have. I'm not offering  
6 it. He may not even be familiar with  
7 it.

8 THE WITNESS:

9 A. I don't believe I've ever seen this  
10 document.

11 MR. KREBS:

12 Q. Okay. Would it be correct, then, you  
13 wouldn't be aware of any possible enforcement  
14 action by the Indiana Environmental Management  
15 Board against Gary Development in 1983?

16 A. Not necessarily, no.

17 Q. Do you know who Mr. Pickard is?

18 A. Presently, yes.

19 Q. Okay.

20 A. He was a Technical Secretary.

21 Q. In that position, was he the Chief  
22 Operating Officer at that time of the  
23 Environmental Agency in the State of Indiana?

24 A. Yes.

1 Q. Okay. And he reported directly to  
2 the full Board?

3 A. Yes.

4 Q. Environmental Board?

5 A. Correct.

6 Q. Do you know who Mr. Pearson is?

7 A. Yes, I do.

8 Q. Is he the Chief Law Enforcement  
9 Officer in the State of Indiana?

10 A. Yes, he is.

11 Q. Do you know whether or not the State  
12 of Indiana, by the Chief Law Enforcement  
13 Officer or the Attorney General, ever brought  
14 any enforcement action in 1983, '84, '85, '86  
15 against Gary Development, to your knowledge?

16 A. Not to my knowledge, no.

17 Q. Would you be surprised if they never  
18 did bring any enforcement action against Gary  
19 Development for anything during those years?

20 A. Could you qualify that? I don't  
21 understand.

22 Q. Would it surprise you -- would it  
23 surprise you if there would be evidence put in  
24 this case that never, 1983, '84, '85, '86, '87,

1 has the Attorney General's Office of the State  
2 of Indiana brought enforcement action against  
3 Gary Development Company?

4 MR. RADELL: Your Honor, I don't  
5 see why it's important, Mr. Warner's  
6 emotional reaction to this. If  
7 Mr. Krebs wants to ask whether an  
8 enforcement action has been taken,  
9 why doesn't he just ask that, without  
10 asking for the witness' personal  
11 response to what may or may not have  
12 happened.

13 THE COURT: I think that appears  
14 to be a standard question, would you  
15 be surprised if.

16 MR. KREBS: It's a hypothetical  
17 question, based upon evidence I'm  
18 going --

19 MR. RADELL: Which entails his  
20 reaction to something within the  
21 enforcement construction of this  
22 Agency.

23 THE COURT: Well, you're  
24 overruled, Mr. Radell. I'll allow

1 it.

2 THE WITNESS: Well, from what  
3 aspect? Could you just clarify that  
4 for me?

5 MR. KREBS:

6 Q. Well, you indicated in a memorandum  
7 that you thought N-146 was an enforcement  
8 action against Gary Development; and my  
9 question is, I guess, would you be surprised to  
10 find out that there had been no enforcement  
11 actions against Gary Development, '83, '84, '85,  
12 '86, '87?

13 MR. RADELL: Your Honor, he  
14 indicates in his memo the existence  
15 of an Environmental Management Board  
16 complaint, Cause Number N-146. He  
17 does not say that the complaint is  
18 against Gary Development Company or  
19 that it was brought by either ISBH or  
20 IDEM. So I think the question is  
21 misleading.

22 THE WITNESS:

23 A. If I may further clarify --

24 MR. KREBS: Okay, it's cross-



1 examination --

2 THE COURT: Now, just a moment.  
3 The witness hasn't finished his  
4 answer, and he may add to it. I  
5 think the question is proper.

6 THE WITNESS:

7 A. I would be surprised.

8 THE COURT: Are you finished?

9 THE WITNESS:

10 A. In my own personal opinion, I would be  
11 surprised if the State of Indiana had not  
12 brought any action against Gary Development.

13 MR. KREBS: Okay. I have no  
14 further cross-examination questions.  
15 Thank you, Your Honor.

16 THE COURT: Redirect.

17 R E D I R E C T E X A M I N A T I O N

18 BY MR. RADELL

19 Q. You indicated that you would be  
20 surprised if the State of Indiana did not bring  
21 any action. Amongst those actions which would  
22 or would not surprise you, would the referral  
23 of the matter to U. S. EPA for enforcement be  
24 one of those actions which the State of Indiana

1 might have taken?

2 A. Not from the hazardous waste  
3 standpoint. I don't believe there was a lot of  
4 work done on the facility, as far as hazardous  
5 waste management.

6 Q. So, you're saying that the State of  
7 Indiana would not refer this matter to U. S.  
8 EPA for enforcement for hazardous waste?

9 A. Yes, it would.

10 Q. Okay. Regarding your review of the  
11 documents from USS Lead and how you said that  
12 you have not seen any manifest from USS Lead,  
13 saying that they shipped waste to Gary  
14 Development Company, have you reviewed all of  
15 USS Lead's documents concerning hazardous  
16 waste?

17 A. No, I have not.

18 Q. Is it possible that such documents  
19 maybe exist, but you just haven't seen them?

20 A. Correct.

21 Q. You mentioned some sort of like cap  
22 or cover that was over the area where the waste  
23 from Jones and Laughlin Steel had been buried,  
24 or at least was pointed out to you by Mr.

1 Hagen; did it not?

2 A. At the time it was characterized as  
3 waste from American Chemical Services.

4 Q. Oh, I see. Did -- are there, in  
5 general, regulations, Indiana State Regulations  
6 which describe the way that these such caps  
7 over substances that may be hazardous waste are  
8 supposed to be constructed?

9 A. Yes, there are.

10 Q. In your inspections, have you ever  
11 seen any reports or any documentation that this  
12 cap does meet those RCRA regulations?

13 A. No, I have not.

14 Q. Okay. We've heard a lot about  
15 leachate today. You know, we're a little  
16 unclear as to the definition, whether or not it  
17 is some sort of scientific definition, based  
18 upon chemical analysis. Based upon your  
19 understanding of the Indiana regulations, does  
20 it define leachate in these specific terms?

21 A. Yes, it does.

22 Q. How does it define leachate? Does  
23 leachate have to -- in order to be leachate,  
24 does a liquid have to contain certain chemical

1 parameters?

2 A. Not necessarily, no.

3 Q. So, then, what makes it leachate?

4 A. If it's come in contact with  
5 hazardous waste.

6 Q. And it has leached through it?

7 A. Yes.

8 Q. So, that possibly even pure water can  
9 be leachate, if it has leached through  
10 hazardous waste?

11 A. Correct.

12 Q. Okay. Thank you.

13 THE COURT: I believe I have a  
14 statutory citation here. I'm looking  
15 at one version of the rules provided,  
16 where it's -- I show the witness  
17 Title 320 of the Indiana Environment-  
18 al Management Board Regulations.  
19 (Tendered).

20 MR. RADELL: Is that from the  
21 May 1st, 1987 regulations, Your  
22 Honor?

23 THE COURT: No, this must be  
24 something else. Here's the May -- it

1 should be in the May 1st?

2 MR. RADELL: Yes, it is, Your  
3 Honor, on page 1568.

4 MR. KREBS: I'm sorry, could you  
5 give me the page --

6 MR. RADELL: We're looking at  
7 the Indiana State Regulations.

8 MR. KREBS: 320 or 330.

9 MR. RADELL: 320, the hazardous  
10 waste ones.

11 MR. KREBS: And which ones?

12 MR. RADELL: 330 IAC 4.1-1-7,  
13 the definition of leachate.

14 THE COURT: Okay, that's the  
15 cite?

16 MR. RADELL: Yes.

17 THE COURT: Any further  
18 questions?

19 MR. RADELL: No, Your Honor.

20 THE COURT: Any recross?

21 MR. KREBS: Very brief, Your  
22 Honor.

23 R E C R O S S E X A M I N A T I O N

24 BY MR. KREBS

1           Q.    You've indicated that you didn't know  
2 of any proof that the cover material in the  
3 northeast area of the Gary Development's  
4 facility met regulations. Do you know of any  
5 proof that the cover material on that area does  
6 not meet regulations?

7           A.    No.

8           MR. KREBS: That's all the  
9 questions I have, Your Honor.

10          THE COURT: Thank you, Mr.  
11 Krebs. Thank you, Mr. Warner, you're  
12 excused.

13          MR. RADELL: Your Honor, before  
14 we call our next witness, I would  
15 like to ask approximately the timing  
16 you envision for the proceedings  
17 today? I have a business appointment  
18 in Chicago at 6:30 and would like to,  
19 if possible -- I thought we would  
20 start on time today, and so I made  
21 this other appointment at 6:30. And  
22 if possible, I would like the  
23 proceedings today to end by 5:00.  
24 I'm prepared to stay as late tomorrow

1 or Friday as necessary, to compensate  
2 for this.

3 THE COURT: And we all though we  
4 would start on time today. We will  
5 certainly go to 5:00. I would have  
6 gone a little bit longer. Can you  
7 get to Chicago in an hour and a half?

8 MR. KREBS: It's tight, but it  
9 can be done.

10 THE COURT: I'd like to find out  
11 how you do that. Yes, we'll end at  
12 5:00 or shortly thereafter. But  
13 tomorrow night, if it appears that we  
14 can finish this proceeding, assuming  
15 we go tomorrow and assuming we come  
16 somewhere near finishing it, we will  
17 stay late, in order to do that. If  
18 it looks like we can't possibly  
19 conclude, there's no sense in our  
20 keeping everybody here tomorrow in  
21 order to do it. So, we'll see how  
22 the days go; and we'll end in a  
23 couple of hours, yes.

24 (Proceedings Recessed and Continued)

NOTES

COOPER,  
Jonathan P.



1 MR. RADELL: Complainant calls  
2 Jonathan Cooper to the stand.

3 (Witness summoned and sworn by Reporter)

4 JONATHAN COOPER,  
5 having been first duly sworn, was examined and  
6 testified as follows:

7 D I R E C T E X A M I N A T I O N

8 BY MR. RADELL

9 Q. Could you please state your name for  
10 the record.

11 A. My name is Jonathan P. Cooper.

12 Q. And could you provide your business  
13 address?

14 A. My business address is 230 South  
15 Dearborn Street, Chicago, Illinois.

16 Q. Where are you employed, Mr. Cooper?

17 A. I'm employed in the Waste Management  
18 Division of U. S. EPA, Region V, in the RCRA  
19 Enforcement Section.

20 Q. How long have you been employed in  
21 the RCRA Enforcement Section?

22 A. Two years this month.

23 Q. And is that how long you've been  
24 employed by U. S. EPA?

1 A. That's correct.

2 Q. You said that you work in the RCRA  
3 Enforcement Section. Could you briefly  
4 describe for us what your duties are?

5 A. I've been assigned about between 22  
6 and 25 cases of facilities which I monitor,  
7 anything that comes on these facilities  
8 regarding groundwater monitoring, inspections  
9 of groundwater monitoring, financial  
10 information and other inspections, just to  
11 generate inspections. Anything that comes in,  
12 goes through my supervisor and comes across my  
13 desks; it is filed. And so I have a pretty  
14 good idea of what comes in on all the  
15 facilities.

16 Q. Why do you monitor them, I mean, if  
17 you're in the Enforcement Section for the  
18 purposes of Agency enforcement action?

19 A. That's correct.

20 Q. So --

21 A. If it comes to that, yes, we're aware  
22 of what's going on at sites.

23 Q. Okay. Where were you employed,  
24 before you were employed by U. S. EPA?

1           A.    I worked for a geo-technical firm in  
2           La Fox, Illinois.

3           Q.    How long were you employed there?

4           A.    Six months.

5           Q.    And in what capacity?

6           A.    I would go to sites where they were  
7           doing construction on the roads or buildings  
8           and would use nuclear density gauges and  
9           penetrometers to test either the compaction of  
10          the soil or the conditions of the soil for  
11          bearing capacity purposes for the construction  
12          that's being done.

13          Q.    Do you have an undergraduate degree?

14          A.    Yes, I do.

15          Q.    And where did you get your under-  
16          graduate degree?

17          A.    I have an undergraduate degree and a  
18          Bachelorate of Science in Geology from Wheaton  
19          College in Illinois.

20          Q.    And when did you get that?

21          A.    1971.

22          Q.    Have you done any graduate studies?

23          A.    Yes, I have.

24          Q.    And what have they been?

1           A.    In geology, as well, I have a Masters  
2 Degree in Geology from Northern Illinois  
3 University.

4           Q.    And when did you get that?

5           A.    In 1984.

6           Q.    Okay. Do you belong in any  
7 professional associations?

8           A.    Yes, the Geological Society of  
9 America.

10          Q.    Okay. Have you had any training  
11 since your graduate studies, which relate to  
12 your Geologist or your duties at U. S. EPA?

13          A.    I have attended several seminars  
14 given at U. S. EPA, specifically in areas like  
15 calculations of RCRA penalties, groundwater  
16 monitoring at hazardous waste sites,  
17 application of the technical enforcement  
18 guides' document at hazardous waste sites, for  
19 groundwater monitoring purposes, writing of  
20 orders, compliance orders, which citations to  
21 use and how to use them. Those would be the  
22 main types of courses that I have attended.

23          Q.    You say you think you have about 22  
24 to 25 cases.

1 A. Yes.

2 Q. How many of those have been like  
3 active enforcement cases that have resulted in  
4 the issuance of a complaint?

5 A. I've been involved in 13, at least 13  
6 complaints that have been issued.

7 Q. Have they also --

8 A. Ten of those -- excuse me?

9 Q. No, continue.

10 A. Ten of those would be compliance  
11 orders.

12 Q. Administrative orders?

13 A. Civil administrative orders. Three  
14 of those have been issued by the Department of  
15 Justice.

16 Q. So, those have been civil actions in  
17 the Federal Courts?

18 A. Civil action in the Federal Court.

19 Q. Okay. Roughly, how many proposed  
20 penalties for these actions have you  
21 calculated?

22 A. Ten.

23 Q. Ten for the ten administrative  
24 actions?

1 A. Yes, and one for civil action.

2 Q. Okay. Have you ever been to the Gary  
3 Development Company facility?

4 A. Yes.

5 Q. And for what purpose?

6 A. I accompanied Mr. Warner on August  
7 27th of this year in an oversight capacity,  
8 which is an ongoing part of the RCRA program  
9 from the Federal point of view. We are  
10 assigned or we are required to oversee the  
11 state activities, and one of them is to watch  
12 how the inspection is done and comment on the  
13 way it's done and keep a record of that.

14 Q. Okay. I take it that you are the  
15 U. S. EPA, RCRA enforcement staff person  
16 assigned to the Gary Development case?

17 A. Yes, correct.

18 Q. And as such, you are the staff person  
19 who maintains the Agency records regarding the  
20 technical enforcement aspects of this case?

21 A. That's right.

22 Q. Based upon your review of these  
23 records, just in your regular course of duties  
24 and your visit to Gary Development Company

1 facility, are you fairly familiar with the  
2 operations at the Gary Development Company  
3 facility?

4 A. Yes, with what I've seen in the  
5 records, yes.

6 Q. Okay. Could you just describe,  
7 generally, the facility, like how big it is  
8 and -- you know, what they do there.

9 A. I understand that it's a 62-acre site  
10 that accepts refuse, which could be described  
11 as municipal, industrial and commercial waste.

12 Q. It's 62 acres. Like, roughly, how  
13 deep is the landfill part; do you have an idea?

14 A. It's my recollection that the waste  
15 may be as far as 60 to 80 feet below the  
16 grade -- I'm not positive to that depth -- and  
17 also it extends somewhat above grade at this  
18 point, the surrounding land.

19 Q. So, it's basically a sanitary  
20 landfill?

21 A. Yes.

22 Q. Okay. Could you just briefly explain  
23 like who's regulated by RCRA, what sort of  
24 facilities are regulated by RCRA?

1           A.     RCRA was designed, basically to use  
2     the phrase that's been used several times, to  
3     manage hazardous waste, specifically as defined  
4     in the RCRA regulations, from the cradle to the  
5     grave. And that means that anyone who's  
6     generating the waste is subject to it; people  
7     that transport the waste are subject to certain  
8     regulations; and the treatment and storage and  
9     disposal facilities are also subject to certain  
10    regulations. Tracking systems are developed,  
11    manifest forms are in triplicate or more;  
12    copies are used to track the waste that is  
13    generated, with the signature of the generating  
14    facility, their ID number, signature of who's  
15    signing off when the waste was picked up by the  
16    transporter, the transporter's address, the  
17    transporter's U. S. EPA ID number; their  
18    signature, if they've accepted waste; and when  
19    it is delivered to a treatment, storage or  
20    disposal facility, someone at that facility  
21    accepts the waste and signs their name; and  
22    copies then are sent back to the generator, so  
23    that they know the waste was delivered to the  
24    treatment, storage or disposal facility. And



1           this way the waste is tracked from beginning to  
2           end.

3           Q.     Okay. We've heard before that the  
4           State of Indiana is an authorized state. Do  
5           you know whether they have their Phase I and/or  
6           their Phase II authorization?

7           A.     They received Phase I authorization  
8           on August 18th, 1980 -- or '82, excuse me.  
9           Final authorization was granted to the State of  
10          Indiana on January 31st, 1986.

11          Q.     Does -- as you understand it, does  
12          U. S. EPA retain any authority in authorized  
13          states?

14          A.     Yes, they do.

15          Q.     And what type of authority?

16          A.     The order of authority that we  
17          discussed earlier, 3008(a)(2), that we read  
18          earlier into the record, and also the oversight  
19          capacity which I described in my trip with  
20          Mr. Warner to the site.

21          Q.     Did -- do states routinely or  
22          regularly or even ever refer actions to U. S.  
23          EPA, even if they're an authorized state, they  
24          refer an action to U. S. EPA for enforcement?

1           A.    It's not uncommon at all, happens all  
2 the time.

3           Q.    Did the State of Indiana refer this  
4 action to U. S. EPA for enforcement, the Gary  
5 Development Company?

6           A.    Yes, they did. We received a  
7 referral package, sometime in October of 1985,  
8 to enforce against the violations for the State  
9 of Indiana in this case.

10          Q.    And you've -- those violations were  
11 RCRA violations, so they pertained to  
12 allegations of violations concerning hazardous  
13 waste, as opposed to concerning solid waste  
14 regulations?

15          A.    Yes.

16          Q.    Okay. Does EPA -- well, we mentioned  
17 earlier that EPA must notify the State, when it  
18 takes an enforcement action in an authorized  
19 state. Did EPA notify the State of Indiana  
20 that we were going to take this enforcement  
21 action?

22          A.    Yes.

23          Q.    Okay. I would like to show the  
24 witness a document which I have marked as

1 Complainant's Exhibit Number 14. (Tendered).

2 Is this a copy of the notification which  
3 U. S. EPA sent to the State of Indiana  
4 regarding this action?

5 A. Yes, it is.

6 MR. RADELL: I would like to  
7 move the Court to admit this as  
8 Exhibit Number 14.

9 THE COURT: Mr. Krebs.

10 MR. KREBS: May I have just a  
11 moment. I guess I do have a  
12 question. I'm not sure of the form  
13 of the objection, but I would just  
14 like to clarify this.

15 V O I R D I R E E X A M I N A T I O N

16 BY MR. KREBS

17 Q. Mr. Cooper, what's this block thing  
18 on the bottom of the letter (indicating)?

19 A. That's a sign-off of all the  
20 reviewers, the typist, the author -- myself in  
21 this case -- and the unit chief, my supervisor,  
22 secretary to my unit chief's supervisor; and,  
23 then, finally in this case, the hazardous waste  
24 enforcement branch chief's signature, who

1 signed it. This is taken from a carbon copy of  
2 the original. The signatures are signed off on  
3 the carbon copy, directly below the original.

4 Q. Well, this wouldn't be a carbon copy  
5 of the original letter actually sent to and  
6 received by, if they proceed with the State of  
7 Indiana, would it? Would this be a carbon copy  
8 of a copy of the letter in EPA's file?

9 A. This is a copy of a yellow carbon  
10 copy. I don't know if that's the correct term.  
11 There's no carbons between them -- I guess  
12 there is, yes, there's carbons between them.  
13 This block does not appear on what was sent to  
14 Indiana; that is for U. S. EPA files, indicat-  
15 ing a sign-off procedure that we follow.

16 Q. Okay. Now, would it be correct that  
17 the letter, any letter going to the State of  
18 Indiana would probably have some letterhead on  
19 the top of it?

20 A. Yes.

21 Q. It said EPA or something?

22 A. Sure. It doesn't appear on the  
23 carbons.

24 MR. RADELL: May I just explain

1                   briefly, because this is gonna come  
2                   up on a couple of our exhibits,  
3                   probably that whenever a document --

4                   THE COURT: Is this something  
5                   that you can have the witness  
6                   explain, so that it is as a formal  
7                   matter of testimony; otherwise, I'd  
8                   have to swear you.

9                   MR. RADELL: Okay, I'm sorry.

10                  MR. KREBS: Then I got a  
11                  problem.

12                  THE WITNESS:

13       A.       The letterhead, U. S. EPA official letterhead  
14               is on a white sheet of paper. When they print  
15               out the final version of the letter, they pick  
16               up a white sheet of paper with the letterhead  
17               on it; they pick up five or six carbon copies  
18               without letterheads, and they just put them  
19               behind and put it into the typewriter; and  
20               that's why the carbons don't come out with  
21               official letterhead.

22                  MR. KREBS:

23               Q.       This would be a copy of one of those  
24               copies of a carbon copy?

1           A.     Carbon copies.

2                     MR. RADELL:

3           Q.     Does the Agency keep an actual copy  
4           of the letterhead letter that is signed off, or  
5           does it keep just a back carbon copy such as  
6           this, with this whole sign-off chain?

7           A.     Both of them are kept, or we -- I'm  
8           trying to -- I know that this is in the record,  
9           the yellow copy is. I can't -- actually, I  
10          don't know for sure that the -- except in the  
11          case of a complaint. In this case, I don't  
12          think there was an original kept with the  
13          letterhead.

14          Q.     All right.

15          A.     A complaint always has a signed  
16          yellow sheet like this one the carbon copy came  
17          from -- or this copy has been made from. But  
18          also you keep the original letterhead of the  
19          complaint itself.

20                    THE COURT: This is astonishing  
21                    to me. I didn't know anybody used  
22                    carbon anymore. I certainly don't.

23                    MR. RADELL: Modern technology  
24                    hasn't caught up with the Regions

1 yet, I'm afraid.

2 THE COURT: I won't make any  
3 comment about that.

4 MR. KREBS: I have a confession,  
5 Your Honor. Our firm uses carbons,  
6 too, and I've asked that question  
7 many times, why do we still use it.

8 THE COURT: In this instance it  
9 would be, in my opinion, much better  
10 to have this document on the Agency  
11 letterhead than to have it -- and  
12 it's not even straight on the paper  
13 here. And I certainly think this  
14 chain, remarkable chain of sign-off,  
15 including the typist is not -- you're  
16 saying there's no original copy of  
17 this document?

18 MR. RADELL: It is with the  
19 State of Indiana. This is the only  
20 copy that U. S. EPA retains, this  
21 back yellow copy, unfortunately.

22 THE WITNESS: The yellow copy is  
23 better lined up. Of course, this is  
24 just a copy of the yellow copy. And

1           you'll find that another problem with  
2           these yellow copies is that they  
3           don't copy very clearly.

4           THE COURT: Is there any  
5           objection?

6           MR. KREBS: I have -- I think I  
7           have one more question. I kind of  
8           lost track here.

9           Q. Are you the keeper of the records,  
10          who would have custody of these records where  
11          this was copied from, or is that somebody else?

12          A. I'm not the keeper of the records;  
13          but if I'm working on a case, I pull out the  
14          files, every file that's available on that  
15          facility.

16          Q. Who copied this document?

17          A. I imagine I give the copies -- or the  
18          files to mark in this case, Mr. Radell probably  
19          submitted them for copying for exhibits.

20          MR. RADELL: Yes, that's the  
21          case.

22          MR. KREBS: We have two  
23          objections on the document, both as  
24          to authenticity and the document has



1 not been properly authenticated.

2 There's no certification on it by the  
3 keeper of the records or anyone who  
4 would have control of the records of  
5 the Agency.

6 Secondly, from the testimony  
7 this is not the original, it's not a  
8 copy of the original document. It's  
9 a copy of a copy. Therefore, it's an  
10 improper document.

11 THE COURT: Well, I don't like  
12 the way it looks, either; but we've  
13 had the witness discuss it quite a  
14 bit and I don't -- I don't think I  
15 have too much of a problem with it.

16 Mr. Radell, anything you want to  
17 add to this?

18 MR. RADELL: No.

19 THE COURT: I'm going to admit  
20 it, even though I wish we had a copy  
21 of the thing itself, rather than a  
22 copy of the yellow carbon.

23 Number 14 is admitted.

24 (Complainant's Exhibit No. 14 Admitted)

## D I R E C T     E X A M I N A T I O N

BY MR. RADELL

Q.     Mr. Cooper, you're aware that parts of the complaint talk about interim status and the fact that Gary Development Company doesn't have interim status. Could you explain what interim status is and how someone gets it.

A.     It's very specific about how a facility has interim status. First of all, one of the requirements of three, one of the requirements is to have submitted a notification of hazardous waste activity by August 18th, 1980.

Secondly, the facility managing hazardous waste is to have been in existence as of November 19, 1980; and as of that date, number three, they should have submitted a Part A of the permit application to U. S. EPA.

Q.     Okay. And what is interim status? What can one do when one has interim status?

A.     The facility that manages hazardous waste that has interim status is, of course, required to handle the waste in a manner described in the regulations, with all of the

1 training and personnel, all of the records that  
2 are supposed to be kept, groundwater  
3 monitoring. It applies to generators,  
4 regulators -- or generators, transporters,  
5 treatment storage or disposal facilities. They  
6 may handle hazardous waste, as long as they  
7 have an interim status.

8 Q. So, they may handle the hazardous  
9 waste, as long as they have interim status. In  
10 fact, that's how interim status sort of implies  
11 that it ends. How does interim status end?

12 A. When the facility receives a finally  
13 effective permit from the Agency, whether it's  
14 U. S. EPA formally or at this point IDEM, that  
15 comes from submittal of Part B application.  
16 Those details are worked out between the  
17 facility and the Agency.

18 Q. Is that the only way that one can --  
19 that interim status terminates? Like what if  
20 somebody doesn't get the permit or --

21 MR. KREBS: I'm sorry, I can't  
22 hear the question.

23 MR. RADELL: Is that the only  
24 way that interim status terminates?

1 Does it also terminate for people who  
2 do not get the permits?

3 MR. KREBS: Thank you.

4 THE WITNESS:

5 A. It does terminate for facilities  
6 under the hazardous and solid waste amendments  
7 of 1984. Facilities handling hazardous waste  
8 who did not certify by November 8th, 1985, that  
9 they were in compliance with RCRA groundwater  
10 monitoring regulations and with financial  
11 regulations and have also submitted a Part B  
12 application by that date, interim status would  
13 end on that date for them; and they would have  
14 been required to submit closure -- a closure  
15 plan within a specified amount of time.

16 MR. RADELL:

17 Q. Okay. So that facilities -- I'm  
18 sorry, did you actually state the date by which  
19 they had to submit the Part B application and  
20 the certification? What is that date?

21 A. November 8th, 1985.

22 Q. All right. So, facilities who do not  
23 submit the Part B and the certification of  
24 groundwater monitoring or financial assessment

1 must close -- submit a closure plan by November  
2 11th, 1985?

3 A. That's November 8th, 1985.

4 Q. November 8th. Does that requirement  
5 apply to facilities that never attained interim  
6 status but should have?

7 A. Yes.

8 Q. Based upon your review of the files  
9 for this case, have you ever seen a  
10 notification of hazardous waste activity form,  
11 submitted to either U. S. EPA or the State of  
12 Indiana, by Gary Development Company?

13 A. No, I have not.

14 Q. Does EPA ever seek to verify whether  
15 or not a facility has submitted such a  
16 notification, like by telephone or letter?

17 A. Occasionally.

18 Q. Are you aware of any communications  
19 between EPA and Gary Development Company  
20 regarding their submission of a notification?

21 A. Yes.

22 Q. Do you recognize this letter?

23 (Tendered.)

24 A. Yes.

1 Q. Could you identify it for us?

2 A. This is a copy of a letter from --  
3 Richard Shandross, State Implementation Officer  
4 of EPA, to Mr. Bruce Palin at the Indiana State  
5 Board of Health, dated June 10th, 1982.

6 Q. Could you summarize the last  
7 paragraph of this letter, after you've had time  
8 to review it?

9 MR. KREBS: Well, I'm gonna  
10 object to the summarization before  
11 it's offered.

12 THE COURT: Yes, may we have the  
13 offer, at least, first.

14 MR. RADELL: All right. I would  
15 like to offer this document, which I  
16 have identified as Complainant's  
17 Exhibit Number 28, into evidence.

18 MR. KREBS: If I could have just  
19 a moment. I'm not sure I have an  
20 objection.

21 MR. RADELL: I would like to add  
22 that we're not introducing this as an  
23 admission by Gary Development Company  
24 that they did not have the

1 notification in, but just merely as  
2 correspon- dence which shows that EPA  
3 has spoken with Gary Development  
4 Company and informed them that it is  
5 EPA's opinion that they should have  
6 sub- mitted an application.

7 MR. KREBS: Okay. I'm sorry.  
8 You're offering this not as to any  
9 admissions on behalf Gary Develop-  
10 ment, but as evidence that EPA held  
11 the opinion that this form should  
12 have been submitted?

13 MR. RADELL: And that we so  
14 notified -- or we so communicated  
15 that fact to Gary Development.

16 MR. KREBS: To somebody for  
17 Gary?

18 MR. RADELL: Yes.

19 MR. KREBS: Is that the extent  
20 of why you're offering the document?

21 MR. RADELL: Basically. But,  
22 then, I am also offering it to show  
23 that it is possible to get a U. S.  
24 EPA identification number by

1 submitting a Part A, instead of --  
2 that you don't have to submit a  
3 notification form to get an EPA  
4 identification number; that EPA also  
5 gives those numbers to Part A, to  
6 people that submit Part A, because  
7 that has been brought up elsewhere.

8 MR. KREBS: Based upon those  
9 limitations on the offer, we have no  
10 objection to 28.

11 THE COURT: Number 28 is  
12 received.

13 (Plaintiff's Exhibit No. 28 is Admitted)

14 MR. RADELL:

15 Q. Mr. Cooper, could you just briefly  
16 describe the last paragraph of that letter,  
17 with regards to any communications EPA had with  
18 Gary Development Company about the  
19 notification?

20 A. There are two points in that regard.  
21 First of all, Gary Development's attorney at  
22 this time, Mr. Hiestand, indicated, quote, that  
23 the initial one-page notification form which  
24 told of the corporation's interest in being a



1 permitted site was misfiled, unquote. It  
2 doesn't state where it was misfiled, but it  
3 just is left rather vaguely stated.

4 The second point here, if I may point out,  
5 is that someone at U. S. EPA received a call  
6 from Mr. Hagen, the site operator, on September  
7 11th, 1980, in which he told them he had not  
8 received a copy of the notification form as  
9 yet.

10 Q. So, this letter sets forth U. S.  
11 EPA's position that the notification form had  
12 not been submitted in a timely fashion?

13 A. Yes. So, we're talking about three  
14 weeks or so after the timely notification  
15 should have been submitted, if it were timely,  
16 on August the 18th, 1980.

17 Q. Okay. Concerning a U. S. EPA  
18 identification number and the assignment of  
19 such a number to a facility, is the fact that a  
20 facility has an EPA identification number proof  
21 that it submitted a notification?

22 A. Apparently not, judging on the second  
23 and the third paragraph. Of course, the normal  
24 procedure at that time was to have submitted a

1 notification, initially, two or three months  
2 earlier. In this case, according to this  
3 document, determination was made when this  
4 letter was written that the number was issued  
5 with the filing of the Part A.

6 Q. Okay. All right, thank you.

7 I'm showing the witness what I have marked  
8 as Complainant's Exhibit Number One.

9 (Tendered.)

10 John, do you recognize that document?

11 A. Yes. This is the Part A submitted by  
12 Gary Development to U. S. EPA.

13 Q. What is the date on this document?

14 A. It is signed by a Mr. Hagen, November  
15 18th, 1980.

16 MR. RADELL: I would like to  
17 move to admit this document into  
18 evidence.

19 THE COURT: Mr. Krebs.

20 MR. KREBS: May I have just a  
21 moment, so that I can show this to my  
22 client.

23 No objection.

24 THE COURT: Number one is

1 received.

2 (Complainant's Exhibit No. One Admitted)

3 MR. RADELL:

4 Q. Mr. Cooper, could you please tell me  
5 what sort of activity this application is  
6 applying for?

7 A. The process code indicates that it  
8 refers to disposal in a landfill -- disposal of  
9 hazardous waste in landfill.

10 Q. Does it say what hazardous waste?

11 A. Yes, if you turn over three pages.

12 Q. And I see those hazardous waste are  
13 F006, K087, F005 and F003; is that correct?

14 A. That's correct.

15 Q. What is the waste referred to on line  
16 five?

17 A. Calcium sulphate is the way it's  
18 worded on this Part A, from -- and then you see  
19 U. S. EPA ID number associated with USS Lead.

20 Q. How do you know that's the ID number  
21 for USS Lead?

22 A. Comparing the ID number from the  
23 manifest from USS Lead.

24 Q. Okay. So, based upon this submission

1 of this Part A -- which as you said was  
2 November 18th, 1980, which was of course before  
3 the November 19th, 1980, the deadline that you  
4 had earlier referred to -- and the facility,  
5 was the facility obviously in existence on  
6 November 19th, 1980?

7 A. Yes.

8 Q. So, did the facility meet the three  
9 criteria for having interim status, based upon  
10 your review of the facility records?

11 A. No, it did not, based on not having  
12 submitted a notification of hazardous waste  
13 activity.

14 Q. Okay. And previously you testified  
15 that even facilities without interim status  
16 must close, if they have not submitted the Part  
17 B, the groundwater monitoring certification and  
18 financial assurance certifications by November  
19 8th, 1985; is that correct?

20 A. Yes, if they managed hazardous waste.

21 Q. Okay. Did the Agency ever notify  
22 Gary Development Company that Gary Development  
23 Company did not have interim status?

24 A. Yes, it did.

1           Q.    I'm showing to the witness a document  
2           that I have marked as Complainant's Exhibit  
3           Number Two.  (Tendered).  Could you briefly  
4           describe this letter or what it is, what the  
5           document is?

6                   MR. KREBS:  Again, I'm going to  
7           have to object to the description --  
8           well, you're just gonna identify it  
9           at this point?

10                  MR. RADELL:  Yeah.

11                  MR. KREBS:  You said describe.

12                  MR. RADELL:  Yeah, to identify  
13           it.

14                  THE COURT:  It's not a very good  
15           copy.

16                  THE WITNESS:

17           A.    That is copy of the carbon of a  
18           letter sent from William Miner, Chief of  
19           Technical Programs Compliance Section, to Mr.  
20           Hagen of Gary Development, on June 18th, 1982.

21                  MR. RADELL:  I would like to  
22           move to admit this document into  
23           evidence.

24                  THE COURT:  Mr. Radell --

1 MR. RADELL: I apologize for the  
2 quality of the copy, Your Honor; but  
3 I personally tried to copy the copy  
4 several times, and this was the  
5 sharpest that I could get the copy to  
6 come out.

7 THE COURT: You know the problem  
8 is we can't read some of the numbers;  
9 and the fourth line, for example,  
10 starting with the word "Agency" and,  
11 paren, U. S. EPA, I guess, and "form"  
12 something. Now, I can't make that  
13 out; and unless we can get a copy in  
14 which everything is legible, I'll  
15 have some reservations with it.  
16 Mr. Krebs, any objection to this?

17 MR. KREBS: I have the same  
18 concern. It might appear that  
19 someone has written and added on  
20 missing parts of letters. I'm not  
21 sure if that's true, but I would have  
22 to see the original on it. But  
23 there's G's that appear to be  
24 written, rather than typed, that type

1 of thing. Like in the second  
2 paragraph, third line, the word  
3 "Agency", looks like someone has put  
4 the Y, the end of the Y on the Y.  
5 The same thing with the first line of  
6 the next paragraph. It appears that  
7 the G and the E have been added.

8 THE COURT: Well, that might  
9 have helped my copy. I really --

10 MR. KREBS: Somebody has written  
11 on mine.

12 THE COURT: I'm going to say  
13 here that I'll hear the purpose of  
14 the offer, but we're going to have to  
15 have something better than this.

16 MR. RADELL: If Mr. Cooper, who  
17 has read the original, the original  
18 yellow copy of the letter, can  
19 demonstrate that he is able -- you  
20 know, based upon his review of the  
21 yellow copy, and he can read this in,  
22 you know, the way that the yellow  
23 should have read.

24 THE COURT: Why don't we get the

1 yellow copy. This matter is now in  
2 litigation. It seems to me that if  
3 anybody is going to get stuck with an  
4 illegible copy, it should be Agency  
5 files and not the Court files.

6 MR. RADELL: All right.

7 THE COURT: Now, I've seen  
8 enough of this; and just from my  
9 review of it, some parts of that is  
10 not legible; and I don't think we  
11 should have it.

12 What's the purpose of the offer,  
13 in the first place?

14 MR. RADELL: The purpose is just  
15 to show that we -- that the Agency  
16 has notified Gary Development Company  
17 that it is the Agency's advisory  
18 opinion that the facility does not  
19 have interim status; and that without  
20 such interim status or a final  
21 Federal RCRA Permit, the facility is  
22 operating as a hazardous waste  
23 management facility in violation of  
24 RCRA.



1 THE COURT: Well, you might find  
2 that evidence someplace else, perhaps  
3 even with this witness. If you want  
4 this document in, get the original.  
5 You're going to Chicago tonight; you  
6 might even be passing near 230 South  
7 Dearborn.

8 Mr. Cooper, you recognize this  
9 document? Have you seen the  
10 original?

11 THE WITNESS: Yes, I have. The  
12 form that's on there is 8700-12,  
13 which is the form that's filed, the  
14 notification of hazardous waste  
15 activity.

16 THE COURT: Well, I think if you  
17 want it into evidence, you should  
18 bring it in here. We'll take a look  
19 at it when you get it.

20 MR. RADELL:

21 Q. But, Mr. Cooper, it is your testimony  
22 that U. S. EPA did send Gary Development  
23 Company a letter, advising them that they did  
24 not have interim status; because they did not

1 submit a timely notification form?

2 A. Yes.

3 Q. Okay.

4 MR. KREBS: Your Honor, there's  
5 a small pause here; and I want to  
6 bring up this point. I have five  
7 people subpoenaed for tomorrow,  
8 starting at 9:00 o'clock. I'm not  
9 sure what to do at this point,  
10 because those people are probably all  
11 going to arrive here beginning at  
12 9:00 o'clock. I think there's one  
13 person subpoenaed for 9:00, one at  
14 10:00, and three for 1:00 o'clock.  
15 The three for 1:00 o'clock are  
16 arriving from Indianapolis. The  
17 other two in the morning are from  
18 around this area. I just wanted to  
19 kind of raise that as to point of  
20 order. I'm not sure whether I should  
21 call those people and try to  
22 reschedule them; or whether we should  
23 have them -- it's kind of -- it's not  
24 that I mean to blame anybody, it's

1                   because, you know, we started late.  
2                   Anytime you have subpoenas issued,  
3                   you never know exactly when you need  
4                   people, anyway, it's just a guess.  
5                   It's resulting in more than a guess.  
6                   My guess has been totally wrong,  
7                   because of not being able to start  
8                   this morning. Would you have any  
9                   suggestions on --

10                  THE COURT: All right. I think  
11                  it's two for 9:00 o'clock and three  
12                  for 1:00 tomorrow.

13                  MR. KREBS: Is it two for 9:00?  
14                  I'm sorry, I thought it was 9:00 and  
15                  10:00.

16                  THE COURT: As I looked at the  
17                  subpoenas, that's what I saw. I  
18                  think it would depend upon whether we  
19                  finish the Government's case tonight.  
20                  I'm hoping we will, before we  
21                  adjourn.

22                  MR. KREBS: Based upon the  
23                  number of documents up there --

24                  THE COURT: Maybe those are all

1 copies.

2 MR. RADELL: Some of them are.

3 THE COURT: I don't think we can  
4 answer that question, until we at  
5 least come to the end of today.  
6 Let's talk about it again in another  
7 hour.

8 MR. KREBS: My only concern was  
9 is I don't believe I have any of  
10 these peoples' home phone numbers,  
11 and I'm not sure I can get ahold of  
12 them after 5:00.

13 THE COURT: Let's see. Are  
14 there three for 1:00 o'clock, also  
15 coming from Indianapolis?

16 MR. KREBS: Yeah. Those three I  
17 can get ahold of, because I have --  
18 they are employees of the State of  
19 Indiana, and I have the home phone  
20 number of the Deputy Attorney  
21 General, who is their counsel. So I  
22 can get ahold of them. But the two  
23 in the morning are individuals with  
24 private businesses, and I doubt very

1 seriously that I would be able to  
2 call them at home. I mean, it would  
3 just be by chance, because I don't  
4 even know where they live. I don't  
5 even know what direction to look in.

6 THE COURT: Well, assuming we  
7 finish the Government's case today or  
8 early tomorrow, you're going to want  
9 these people tomorrow morning?

10 MR. KREBS: Right.

11 THE COURT: So, at most, any  
12 telephone call you make at this  
13 moment would tell them that maybe we  
14 don't need you at 9:00, but we're not  
15 sure about that; we'll need you  
16 sometime in the morning. I'm not  
17 sure how much you can tell them.

18 MR. KREBS: Probably nothing.  
19 Okay.

20 THE COURT: If you want to take  
21 a brief recess and go get their home  
22 numbers, in case we know more about  
23 it tonight, I'll be happy to permit  
24 that. Would that be helpful to you?

1 MR. KREBS: I think it would.  
2 I'm just always concerned when you  
3 subpoena people and they have to wait  
4 around in the day and don't testify  
5 or something of that nature.

6 THE COURT: Let's just see if  
7 you can reach them this evening, and  
8 perhaps later we'll know a little  
9 more about it.

10 MR. KREBS: Okay. Thank you.

11 THE COURT: We'll take 10  
12 minutes right now.

13 (Proceedings Recessed and Continued)

14 THE COURT: On the record.  
15 Mr. Krebs.

16 MR. KREBS: Yes, I have -- just  
17 to report back, I was able to reach  
18 one of the two individuals. The one,  
19 there was no answer, his line at  
20 work. It may be that they leave at  
21 4:00 o'clock at his office, at least  
22 part of his office, maybe. But I did  
23 contact one; he gave me his home  
24 phone number, so I will be able to

1 get in touch with at least one of the  
2 two individuals for the morning.

3 THE COURT: Continue,  
4 Mr. Radell.

5 MR. RADELL:

6 Q. Mr. Cooper, did either U. S. EPA or  
7 the State of Indiana ever notify Gary  
8 Development Company that they ought to send in  
9 a Part B application?

10 A. Yes, they did.

11 MR. RADELL: Okay. Since this  
12 document is illegible and I don't  
13 want to subject the Court to having  
14 to make a case-by-case determination  
15 on the legibility or illegibility of  
16 each document, I'm just going to use  
17 it to refresh my witness' memory.

18 MR. KREBS: I just noted here  
19 that we admitted in paragraph 11 that  
20 we were given a notice of the Part B  
21 application and didn't send it in.

22 THE COURT: Yes, I think I did  
23 hear that.

24 MR. RADELL: All right.

1           MR. KREBS: That's our Number  
2           Nine. It says Gary admits the  
3           allegations contained in Number 11.

4           MR. RADELL: I was just trying  
5           to establish that EPA hadn't notified  
6           them of the requirement. They have  
7           admitted that they submitted the Part  
8           B and that they did not certify  
9           compliance with groundwater  
10          monitoring or financial assurance  
11          requirements, but I just wanted to  
12          establish the fact that EPA had  
13          notified them that they were subject  
14          to these requirements. That was my  
15          sole reason for introducing this  
16          testimony.

17          MR. KREBS: That's in the same  
18          letter?

19          MR. RADELL: Uh-huh.

20          THE COURT: All right. So the  
21          additional material there is that the  
22          EPA notified the Respondent?

23          MR. RADELL: Right.

24          THE COURT: Okay.



1 MR. RADELL:

2 Q. Okay. So, could you tell me the date  
3 that EPA notified the Respondent that it had to  
4 submit a Part B?

5 A. This copy of this letter is dated  
6 March 18th, 1985.

7 Q. Okay. And to whom was it sent?

8 A. Sent to Mr. Hagan at Gary  
9 Development.

10 Q. Okay. Thank you.

11 Gary Development Company admits that it is  
12 not certified for compliance with RCRA  
13 groundwater monitoring requirements. Do they  
14 have any groundwater monitoring wells in at the  
15 facility?

16 A. They have four wells on site, which  
17 are there to meet the requirements of the solid  
18 waste program in the State of Indiana.

19 Q. Has EPA or anyone else ever tried to  
20 determine whether these wells, that groundwater  
21 monitoring system that is currently there,  
22 meets the requirements of RCRA?

23 A. Yes. EPA requested a company to do a  
24 groundwater monitoring evaluation at Gary

1 Development.

2 Q. It requested the company, Gary  
3 Development Company?

4 A. A company or a contractor to do that  
5 for U. S. EPA.

6 Q. Okay, all right. I am showing the  
7 witness a document which I have marked as  
8 Complainant's Exhibit Number Four. (Tendered).

9 Mr. Cooper, is this the report which you  
10 just referred to, that EPA requested be  
11 prepared for us?

12 A. Yes, it is.

13 Q. Who prepared the report?

14 A. This was done by Harding Lawson  
15 Associates of Houston, Texas; and it indicates  
16 that Professional Engineer Mr. Tremblay; and a  
17 Certified Geologist, I guess that is, CPG,  
18 would be Senior Hydrogeologist John Wilson was  
19 also involved; although he didn't sign this  
20 particular document, it was signed for him.

21 MR. RADELL: I would like to  
22 move to introduce this into evidence  
23 as Complainant's Exhibit Number Four.

24 THE COURT: Mr. Krebs.

1 MR. KREBS: Preliminary  
2 questions, please, Your Honor.

3 THE COURT: Yes.

4 V O I R D I R E E X A M I N A T I O N  
5 BY MR. KREBS

6 Q. Mr. Cooper, are you familiar with or  
7 do you know either Mr. Wilson or Mr. Tremblay?

8 A. No, I don't.

9 Q. Do you know whether they -- I realize  
10 you said -- you said one of them signed off on  
11 it and another one appears to be signed for,  
12 Mr. Wilson. Do you know whether those two  
13 individuals personally authored this entire  
14 report or whether they may have had associates  
15 working on it for them?

16 A. I don't know.

17 Q. In the document there appears to be  
18 numerous attachments to the text to the  
19 document, starting with I guess Appendix A. In  
20 fact, I guess just the first four pages appear  
21 to be text, is that correct, and the remainder  
22 appears to be all appendices?

23 A. That appears to be right.

24 Q. And without specifically revealing

1 the context of each one of the documents, there  
2 would be included in this document such things  
3 as what would appear to be water sample  
4 identification sheet analyses for Gary  
5 Development; is that right?

6 A. Yes, uh-huh.

7 Q. It has a lab number, etc.

8 A. Yes. Those are parameters that we  
9 look for in the solid waste program in Indiana.  
10 They're not RCRA groundwater parameters,  
11 entirely.

12 MR. KREBS: Your Honor, I'm  
13 gonna have to object to this  
14 document. I think there's a real  
15 problem here on authentication and  
16 hearsay. I realize the Judge has  
17 ruled that the rules of evidence  
18 don't have to be strictly applied in  
19 these cases; but based upon the  
20 witness' testimony, I believe what we  
21 have here is a document, a text  
22 document with two peoples' names on  
23 the front of it, one of which is said  
24 it was signed for the individual.

1 This witness is not personally  
2 knowledgeable about the two  
3 individuals who authored the  
4 document. There are numerous  
5 attachments attached to this,  
6 including water sampling results,  
7 which in many situations one has to  
8 call, you know, a laboratory person  
9 to determine the quality assurance,  
10 QA/QC, for laboratory analyses, in  
11 order to get them in evidence; and  
12 how the samples were taken, to  
13 determine if there was any problem  
14 with the sampling, which as the Judge  
15 may well know, can certainly happen  
16 in this business of sampling, it is  
17 certainly an art. And if the sample  
18 is improperly taken, the test results  
19 are meaningless, anyway. And what we  
20 have here is a document, which first  
21 of all, is hearsay as to the authors  
22 of the document as regards to this  
23 witness; and, secondly, contains all  
24 types of attachments, which would be

1 hearsay even to the authors of the  
2 document. And we, because of that,  
3 we have no ability at all to  
4 cross-examine these individuals as to  
5 their written opinions, nor to  
6 determine whether the documents as  
7 they have attached to this are  
8 accurate and authentic documents.  
9 So, we've got hearsay upon hearsay  
10 and total authentication problems.

11 THE COURT: Mr. Radell.

12 MR. RADELL: I would respond  
13 that this document is a document  
14 which has been submitted to the  
15 Federal Government, under the  
16 sanctions that submitting information  
17 to government officials carry  
18 criminal penalties. I would also  
19 like to add that this is a document  
20 which is a public record, since it is  
21 a document which the Government has  
22 collected pursuant to its fact  
23 finding authority under RCRA, for the  
24 preparation of its enforcement

1 actions. And so, therefore, that it  
2 doesn't constitute hearsay and should  
3 be admitted.

4 THE WITNESS: Your Honor --

5 MR. KREBS: If I can respond  
6 briefly, Your Honor. The problem  
7 with counsel's comments is that this  
8 document evidently includes opinions  
9 of these individuals. Number one,  
10 I've never seen anybody put in jail  
11 if their opinion was correct or  
12 incorrect, either way. I don't think  
13 anybody's going to be sanctioned  
14 criminally, if they gave an opinion  
15 of an expert that was wrong.

16 The problem is, we don't have  
17 any ability in this hearing to  
18 cross-examine these experts -- one  
19 indicates that he is a geological  
20 expert -- as to whether his opinions  
21 are correct or not. It totally -- it  
22 totally destroys our ability to  
23 cross-examine witnesses.

24 Just because something is sent

1 to the Government -- I guess I can  
2 just send documents to EPA, and then  
3 claim they're all public records and  
4 try to put them all into evidence and  
5 not call any witnesses, which I would  
6 have to say is not the way things are  
7 done. And, I mean, I don't think  
8 that's a correct process. But under  
9 the theory of counsel, as long as you  
10 send it to the Government, you can  
11 put it into evidence.

12 If I had just sent the  
13 Government reports of Dr. West here,  
14 you know, I suppose they would be  
15 objected to. Are they gonna just let  
16 them go into evidence and not want to  
17 cross-examine him? You know, I just  
18 don't think on opinion testimony that  
19 that's a proper way to introduce  
20 opinions of experts.

21 THE COURT: The purpose of the  
22 offer is to show that the wells in  
23 place are not suited to RCRA  
24 monitoring?



1 MR. RADELL: Correct.

2 MR. KREBS: Which is an opinion.

3 THE COURT: Well, it is true  
4 that the Respondent doesn't have any  
5 way to cross-examine on this.

6 MR. RADELL: But, Your Honor,  
7 this is -- counsel for Respondent  
8 states that any documents sent in to  
9 the Government can be admitted. That  
10 is not true. It's documents which  
11 are collected by the Government,  
12 pursuant to a fact finding authority  
13 under a statute. This was listed by  
14 the Government, expressly for  
15 purposes, perhaps, of an enforcement  
16 action; so it meets the public record  
17 exception. And one of the reasons  
18 for the public record exception is,  
19 so that the Government doesn't have  
20 to fly people in from Texas to put  
21 them on the stand to testify about  
22 something like this. If that were  
23 the case, the Government wouldn't  
24 have any money to enforce the laws

1           that's mandated by Congress to  
2           enforce.

3           THE COURT: Does this witness  
4           have any information about the  
5           report?

6           THE WITNESS: Yes. May I state  
7           one thing?

8           THE COURT: Well, your counsel  
9           will ask you questions. I'm just  
10          trying to clarify your connection  
11          with it.

12          THE WITNESS: I wanted to  
13          correct one thing. Apparently, in  
14          looking at this John Wilson, who did  
15          not sign the front, he is indicated  
16          as the inspector on Appendix A-1.

17          Now, the counsel for the  
18          Respondent has indicated that there  
19          are only a few pages at the front.  
20          These are summary pages of what is  
21          included in the groundwater  
22          monitoring inspection sheets,  
23          beginning with Appendix A-1. This is  
24          the -- this Appendix A-1 and a lot of

1           what follows is the groundwater  
2           inspection report. This tells you  
3           what is not complied with by the  
4           State of Indiana regulations.

5           And your reference, if I may add  
6           to the chemical analyses that are  
7           included in the back are, evidently,  
8           those supplied by Mr. Hagan to the  
9           people. These were not samples that  
10          were taken. They are dated '82, two  
11          years before.

12          MR. KREBS: The problem is, I  
13          think we're getting into a dialogue  
14          here, Your Honor. The document  
15          doesn't reflect that, we don't know  
16          that. We're surmising now that's how  
17          those documents got placed in here,  
18          that Mr. Hagan might have given them  
19          to somebody and these people may have  
20          put it then in this document. We  
21          don't know that. They're not  
22          properly identified. That's the  
23          problem with applying rules of  
24          evidence. We've got somebody that

1 put together a bunch of documents and  
2 somebody is not here.

3 You know, when we had a report  
4 on site inspections by Mr. Warner and  
5 when they wanted to put in his  
6 inspections, they put him on the  
7 stand and he put in his inspections;  
8 and that gave me the right to ask him  
9 any questions I have on them.

10 What they're doing here is,  
11 they're going to put in somebody's  
12 inspection and their opinion, and the  
13 people aren't even in this state.  
14 And I have no ability to  
15 cross-examine them, which makes this  
16 hearing meaningless. If we can have  
17 people testify by documents -- I  
18 don't mean to just general treatises,  
19 but this is a site specific report,  
20 an investigation by these people; and  
21 we should have the right to  
22 cross-examine these people.

23 And I, you know, beg to differ  
24 with counsel, but under Rule 803(8),

1 under public records and reports  
2 exception to the hearsay rule, this  
3 document doesn't meet that criteria.  
4 This is not a document done by the  
5 Government, itself, and activities on  
6 matters observed by the Government.  
7 This is done by some third party, at  
8 their request; which it is fine, but  
9 we should have the ability to  
10 cross-examine those people.

11 THE COURT: Well, I'm going to  
12 admit it, but I think you should know  
13 that there is a certain amount of  
14 material here that I don't think that  
15 without some ability to cross-  
16 examine, we're going to be able to  
17 rely on; and there was some that  
18 isn't legible. There are diagrams,  
19 for example, that are totally  
20 meaningless, without some explana-  
21 tion; and a couple of pages that I  
22 have some difficulty reading.

23 Now, what I propose is the  
24 following: If I find that I'm being

1 asked to rely on certain portions of  
2 this about which I have some  
3 question, I will let both counsel  
4 know; and we will either have a  
5 witness or we will have some  
6 additional testimony or some  
7 opportunity to cross-examine them.  
8 But for now, I will admit it.

9 MR. KREBS: I do appreciate the  
10 Judge's last comments, and that's my  
11 concern. I have been involved in  
12 some cases that are large document  
13 cases, and documents have gone into  
14 evidence and people said, well, we  
15 won't give it much weight; and, then,  
16 months later, it turns out that's one  
17 of the biggest determining points in  
18 the case, documents where the witness  
19 who offered them wasn't even in the  
20 courtroom.

21 THE COURT: Well, I think I just  
22 said I will --

23 MR. KREBS: Well, I appreciate  
24 your comment, I guess is what I'm

1 saying.

2 THE COURT: Part of my problem  
3 is, I'm not sure exactly to what  
4 extent of this document I'm going to  
5 be asked to rely on. Let's wait and  
6 see what happens. If I find that the  
7 use of the document is going to be  
8 put to -- exceeds my ability to rely  
9 on it, I will get everybody together  
10 and we'll see what happens with it.

11 For example, here's a diagram --  
12 the pages aren't numbered, so I'm not  
13 sure where I am, about two-thirds of  
14 the way through, I'd say -- it  
15 purports to be a well location  
16 drawing. I see an "N" at the top;  
17 and over in the corner, it says Gary  
18 Land Development well location. It's  
19 this one, Mr. Radell (indicating).  
20 It may be that you won't ask me to do  
21 anything with that or ask me to rely  
22 on anything there having to do with  
23 the findings coming up; but let's  
24 leave it that way. I will notify

1                   you, if I think that I can't rely on  
2                   some portion of this that I'm going  
3                   to be asked to rely on for some  
4                   important purpose, but that's the way  
5                   I'm going to leave it. It is  
6                   received in evidence, Number Four.

7                   (Complainant's Exhibit No. 4 Admitted)

8                   MR. RADELL:

9                   Q.    Mr. Cooper, could you please tell us  
10                   the -- well, this report you've testified was  
11                   prepared to compare the existing groundwater  
12                   monitoring system at Gary Development with the  
13                   RCRA regulatory requirements, and to see  
14                   whether or not the existing system does comply.  
15                   Have you reviewed this report in its entirety?

16                   A.    Yes, I have.

17                   Q.    You've gone through it, the various  
18                   attachments?

19                   A.    At some point, not recently; but I  
20                   have looked through it all.

21                   Q.    Do you have -- does the report reach  
22                   any conclusion as to whether or not Gary  
23                   Development Company was in compliance with the  
24                   RCRA groundwater monitoring?



1 MR. KREBS: Objection to the  
2 report -- which I object to it going  
3 into evidence; but for whatever way  
4 it's going in, it speaks for itself.  
5 Now we're asking this witness to give  
6 his opinion as to what these peoples'  
7 opinions are. I think that's totally  
8 objectionable. The report says  
9 whatever it says. You know, what  
10 this witness thinks it says, that  
11 somebody else had an opinion, is  
12 totally improper.

13 THE COURT: Well, the witness  
14 has testified that he reviewed it;  
15 and I will allow him to give his  
16 opinion as to whether or not it  
17 reaches one conclusion or another.  
18 You may answer the question.

19 THE WITNESS:

20 A. The conclusion in this report was  
21 that the groundwater system in place at Gary  
22 Development was not at all in compliance with  
23 the requirements for a RCRA groundwater  
24 monitoring system.

1 THE COURT:

2 Q. Now, where is that in the report,  
3 Mr. Cooper?

4 A. Well, it's summarized, first of all,  
5 on page three, under A, the last paragraph  
6 under A. You will also find it on, later, on  
7 Appendix A-1.

8 Q. All right.

9 A. And number two, where it asks if the  
10 groundwater monitoring program at the facility  
11 has been implemented and is capable of  
12 determining the facility's impact on the  
13 quality of groundwater in the uppermost  
14 aquifer; and the answer is no. And that is the  
15 prime purpose of a RCRA groundwater monitoring  
16 system.

17 MR. RADELL:

18 Q. Mr. Cooper, when the Agency  
19 determines that such a report must be done,  
20 does the Agency make any inquiries into the  
21 credentials of the company that will be  
22 performing the contract; or does it in any  
23 way -- how does the Agency guarantee that such  
24 a report would be credible?

1           A.    I can't speak for the contractor in  
2           this case, A. T. Kearney --

3           Q.    But in general?

4           A.    But in general, if I were getting  
5           somebody to do something under a test contract,  
6           currently, we gather information about the  
7           people that are involved or their specialties,  
8           their degrees, some authentication of the  
9           grading abilities, the publications; and then  
10          make a decision based on that.

11               MR. KREBS:   Your Honor, I have  
12           an objection.   I'm going to move to  
13           strike the answer of this witness.  
14           Number one, it's not responsive to  
15           the question.

16               He's giving a narrative  
17           response.   Number two, now we're  
18           trying to present the credentials of  
19           the absent witness who has wrote the  
20           report.   Only those people can give  
21           their credentials.   Whether those  
22           people are qualified to give this  
23           opinion or not, only can be  
24           determined by testimony from those

1 witnesses. Now we're trying to make  
2 witnesses, who aren't in court,  
3 experts by this type of testimony, as  
4 to what this individual thinks that  
5 the Government thinks of this company  
6 that is not here in court that wrote  
7 this report.

8 THE COURT:

9 Q. Mr. Cooper, you weren't involved in  
10 the selection of this contractor, were you?

11 A. No, I wasn't. This was prior to my  
12 arrival at EPA.

13 Q. And your testimony is going to what  
14 you know of the Agency's attempts to make sure  
15 the contractors are qualified to do what  
16 they're being hired for?

17 A. That's correct.

18 THE COURT: Well, I'm not sure  
19 how helpful this is to the present  
20 instance, but I'll allow it.

21 MR. RADELL: Yes, Your Honor,  
22 I'm not trying to establish the  
23 particular credentials of these  
24 individuals; but I'm just trying to

1 establish the credibility of  
2 Mr. Cooper relying on such reports,  
3 in making his determinations of  
4 whether or not a facility is in  
5 compliance with any RCRA regulations.

6 Q. Okay. Mr. Cooper, does EPA routinely  
7 have contractors prepare such reports, as  
8 opposed to preparing them itself?

9 MR. KREBS: Objection. It has  
10 nothing to do with this case as to  
11 what EPA typically does.

12 THE COURT: All right. You're  
13 saying this isn't relevant to the  
14 present --

15 MR. KREBS: Totally irrelevant  
16 to this issue, this document, what  
17 does the EPA typically do in reports.

18 THE COURT: Well, I guess I  
19 think that, too. Mr. Krebs, the  
20 rules in these proceedings do not  
21 give me a good deal of leeway in  
22 keeping documents out, if they are  
23 irrelevant, the same is true for  
24 testimony.

Since the testimony we're about to hear isn't specific to this document, I guess I don't think it will be particularly helpful in assessing the document. The document is in. I have said that if I'm asked to rely on something that I have a problem with, I will notify counsel; and I think that's about the best I can do with the contents of it, to the extent that the offer of this is for the purpose of -- well, putting into evidence that the groundwater monitoring system doesn't go to the RCRA requirements, that, I think is the main -- what's in here is gonna go to that and not to a whole lot of other things. So, perhaps, it will be somewhat limited. I don't think we need to hear what the Government typically does, if we can't do it in this document.

MR. RADELL:

Q. Mr. Cooper, you testified that this

1 report concludes that the groundwater  
2 monitoring system existing at Gary Development  
3 Company does not meet the RCRA requirements.  
4 Does the report explain why?

5 A. Yes, it does.

6 Q. Have you reviewed the reasons why?

7 A. Yes.

8 Q. Could you state the reasons why and  
9 whether, upon your review of the document, you  
10 agree with the reports' conclusions.

11 MR. KREBS: Objection. The  
12 reports speaks for itself as to what  
13 can be concluded as to why, in the  
14 opinion of these witnesses who aren't  
15 here, they believe the present  
16 monitoring wells don't meet RCRA  
17 requirements. There's no reason to  
18 have this witness recite this report,  
19 which has been offered into evidence  
20 over our objection.

21 THE COURT: As I understand it,  
22 he's going to testify about whether  
23 he agrees with the conclusions  
24 stated. I'll hear that.

1 MR. RADELL: Can he answer the  
2 question?

3 THE COURT: Yes, Mr. Cooper.

4 THE WITNESS:

5 A. First of all, to my knowledge, Gary  
6 Development has never made a determination as  
7 to what the uppermost aquifer is. Therefore,  
8 the four wells which are on site, one located  
9 north, one located east, one south and one  
10 west, are placed in those locations; and that  
11 whatever depth, unknown to myself, for purposes  
12 of the Indiana Solid Waste Program, they were  
13 not placed to be RCRA wells.

14 If you go on in the report, in Appendix  
15 A-1, you will note that under number seven, the  
16 conclusions of these persons who conducted the  
17 inspection was that the wells are not properly  
18 screened. The conclusion of the inspector was  
19 that the annular spaces are not properly sealed  
20 to prevent contamination of groundwater.

21 MR. RADELL:

22 Q. So in general terms, you agree --  
23 based upon your review of the documents in  
24 EPA's files regarding Gary Development



1 facility, your trip to the site and this  
2 report, it is your opinion that Gary  
3 Development Company does not have an accurate  
4 groundwater monitoring system at its facility  
5 for the purposes of RCRA?

6 A. Yes. And if I may add, also, the  
7 report --

8 MR. KREBS: Objection. There's  
9 no question pending. The witness is  
10 just gonna start talking at this  
11 point.

12 MR. RADELL: I believe that the  
13 witness should be able to clarify his  
14 answer.

15 THE COURT: If you have  
16 something to add to your response,  
17 you may certainly do that.

18 THE WITNESS:

19 A. If the wells in place at this time,  
20 even if they were adequate, the report goes on  
21 to state, the sampling that is done on site is  
22 not that required under RCRA regulations; the  
23 parameters that are being sampled are not those  
24 sampled. There's no sampling plan, there's no

1 outline for groundwater quality assessment,  
2 there's no statistical testing of -- or  
3 statistical analyses being done on the samples  
4 that are taken according to RCRA regulations,  
5 to determine if the site is contaminating the  
6 groundwater in the uppermost aquifer parameter.

7 MR. RADELL:

8 Q. Okay, thank you. Are you aware of  
9 any other reviews of the groundwater monitoring  
10 system at Gary Development Company that may  
11 have been conducted by EPA or the State? Did  
12 the State ever conduct their record review?

13 A. I can't recall specific documents,  
14 but I know that the Geology Section has  
15 reviewed some documents.

16 Q. I'm showing the -- excuse me, the  
17 witness an exhibit that I have marked as  
18 Complainant's Exhibit Number 15. (Tendered).  
19 Do you recognize that document?

20 A. Yes, I do.

21 Q. Could you describe it, like what it  
22 is? Identify the document.

23 A. This is a record review form, with a  
24 memo attached to it; and it was completed by

1 Timothy Miller of the Geology Section at the  
2 State Board of Health, on April 18, 1986,  
3 reviewing the groundwater monitoring program in  
4 existence at the site.

5 Q. Okay. Is this a document which you  
6 maintain in your records, as part of your  
7 duties in the RCRA enforcement section?

8 A. Yes, we have this document.

9 MR. RADELL: I would like to  
10 move that this document be admitted  
11 as Complainant's Exhibit Number 15.

12 MR. KREBS: Preliminary  
13 questions, please?

14 THE COURT: Yes.

15 V O I R D I R E E X A M I N A T I O N

16 BY MR. KREBS

17 Q. Mr. Cooper, do you know Timothy J.  
18 Miller?

19 A. No, I don't.

20 Q. Do you know what kind of degree he  
21 has, if any? Does he have a Geology Degree?

22 A. The people that I know that work in  
23 his section have Geology Degrees. I don't know  
24 if he has his degree, I'm not sure.

1 Q. How long has he been with the State  
2 Board of Health?

3 A. I don't know.

4 Q. Is he still with the State Board of  
5 Health?

6 A. I don't know.

7 Q. Were you aware that in April of 1986  
8 the State Board of Health no longer regulated  
9 environmental matters in the State of Indiana,  
10 by Indiana statute; and the State of Indiana  
11 created a Department of Environmental  
12 Management, instead?

13 A. Yes, I am aware of that.

14 Q. This is a memo from the State Board  
15 of Health, correct?

16 A. That's correct. But I don't know  
17 what the date was for the name change.

18 Q. Do you know Karyl K. Schmidt, whose  
19 name appears on this memorandum?

20 A. Yes, I do know Karyl. She's the  
21 Chief of the Geology Section.

22 Q. Okay. Is she still with the  
23 Department of Environmental Management?

24 A. Yes, she is.

1 Q. Does she live in Indianapolis,  
2 Indiana?

3 A. She works there. I don't know where  
4 she lives.

5 Q. She works in Indianapolis, Indiana?

6 A. Yes.

7 Q. Do you know Thomas L. Russell?

8 A. Yes, I do.

9 Q. And where does he work?

10 A. He is -- at this time was Chief of  
11 the Enforcement at State Board of Health, at  
12 the time of this memo.

13 MR. RADELL: Your Honor, I  
14 regret that this is taking such a  
15 great deal of time, the introduction  
16 of these exhibits. I have two  
17 comments. One is that --

18 THE COURT: Wait-wait, I don't  
19 know whether we're finished yet.

20 MR. KREBS: I haven't made my  
21 objection yet.

22 THE COURT: Mr. Krebs is still  
23 exploring the witness. Anything  
24 further?

1 MR. KREBS: May I have just a  
2 moment, please?

3 Your Honor, yes, we have an  
4 objection. This document on its face  
5 says that it's from the State Board  
6 of Health. The State Board of Health  
7 is not a party in this case, is not  
8 referenced anywhere in the complaint.  
9 The individuals whose names appear on  
10 here, at least one or two of them are  
11 witnesses identified that are now  
12 with the Department of Environmental  
13 Management, working in Indianapolis.  
14 There's absolutely no reason why  
15 these individuals could not have been  
16 subpoenaed by counsel to appear and  
17 testify in this case here in the  
18 State of Indiana, as I have  
19 subpoenaed people to testify in this  
20 case from the same department, so  
21 that I can cross-examine them  
22 regarding these documents that they  
23 want to put in evidence. There's  
24 absolutely no excuse, they have no

1           reason why they haven't called these  
2           people. And they just want to put in  
3           opinions after opinions and  
4           inspections after inspections of  
5           witnesses, who we don't even know  
6           half of them, what they look like.  
7           Certainly, the Judge doesn't know.  
8           We can't test their credibility. We  
9           can't test their knowledge. We don't  
10          know whether this person writing this  
11          report even has a degree in geology.  
12          It says he's with the Geology  
13          Section. For all we know, he could  
14          be a secretary and have no degree at  
15          all. He could be an English major.  
16          There's absolutely nothing to  
17          substantiate any opinions given in  
18          here, and there's no excuse for them  
19          not subpoenaing people, if they want  
20          to put documents in. This isn't even  
21          a document of EPA. This is a  
22          document of a state agency, State  
23          Board of Health. It does not come  
24          under any exception to the hearsay

1 rule. It's a business record of a  
2 state agency, who nobody is here from  
3 that state agency to put this  
4 document into evidence. It's not  
5 even certified. I mean, at least  
6 they could have gotten a certified  
7 copy of the document, certified by  
8 the keeper of the records from the  
9 State Board of Health. There's  
10 absolutely no shred of authentica-  
11 tion in this case. And I realize  
12 you've said that the rules of  
13 evidence should not be strictly  
14 applied, but this goes beyond all  
15 reason.

16 If we're gonna try this case  
17 just putting documents in evidence  
18 with no witnesses, we might -- just  
19 as soon as send all of these docu-  
20 ments to you in Washington, D.C. and  
21 not have a hearing; because there's  
22 no ability to cross-examine any of  
23 these people anyway. It's just  
24 whatever these documents say, written



1 by unknown people.

2 THE COURT: Mr. Radell, do you  
3 have anything further?

4 MR. RADELL: The purpose of the  
5 author -- of the offer is to show  
6 that it is the State's opinion that  
7 the groundwater monitoring system in  
8 existence at Gary Land Development  
9 company does not meet the RCRA  
10 requirement; and that based upon his  
11 review of the document, Mr. Cooper is  
12 in concord with the State's  
13 conclusion.

14 MR. KREBS: Your Honor, it's not  
15 the State's opinion. It's the  
16 opinion of Timothy J. Miller, and he  
17 doesn't speak for the State of  
18 Indiana. He's not the Governor, he's  
19 not the head of the Agency. This  
20 agency on this letterhead doesn't  
21 even regulate this area, as of this  
22 date. This is not the opinion of the  
23 State of Indiana.

24 MR. RADELL: I can explain the

1                   discrepancy in the stationery.  
2                   Evidently, they still were using the  
3                   quantities of stationery that they  
4                   had printed out from the ISBH.

5                   MR. KREBS: I'm gonna ask  
6                   counsel be sworn, if he's going to  
7                   testify why this document appears in  
8                   this manner.

9                   THE COURT: I'm going to let it  
10                  in at this time. I don't know who  
11                  Timothy Miller is either and I  
12                  sympathize with you, but I'll admit  
13                  it. Continue.

14                  (Complainant's Exhibit No. 15 is Admitted)

15                  D I R E C T   E X A M I N A T I O N

16                  BY MR. RADELL

17                  Q.   Mr. Cooper, does this report reach a  
18                  conclusion regarding the groundwater monitoring  
19                  system at Gary Land Development Company and its  
20                  compliance with RCRA regulations?

21                  A.   In its summary in the memo, it states  
22                  that Timothy Miller believes that the facility  
23                  is in noncompliance with the RCRA sampling  
24                  program -- groundwater sampling program. I

1 might add that this particular geologist  
2 compared what the facility is sampling under  
3 their solid waste program and to look at what  
4 the regulations require in the RCRA groundwater  
5 monitoring program to sample; and to simply put  
6 yes or no as to what type of samples are being  
7 taken and to reach a conclusion that all of the  
8 indicated parameters requiring regulations are  
9 not the sampled site.

10 Q. Thank you. The last sentence of the  
11 cover memo, does it say that this case has been  
12 referred to the U. S. EPA, Region V, for  
13 enforcement action?

14 A. Yes, it does.

15 Q. Thank you.

16 MR. KREBS: Your Honor, on this  
17 document, on my copy of the second  
18 paragraph, there is a word marked  
19 out, a word marked through and the  
20 letters "okay" written on the line  
21 three. Now, there's been no evidence  
22 as to if that's in the original copy  
23 of this document, if that was added  
24 on by U. S. EPA, once this got in

1                   their files; if it was added on by  
2                   counsel in this case, after he copied  
3                   it from U. S. EPA files. I mean, can  
4                   we ask if the witness knows who  
5                   marked on these documents and what  
6                   those things mean?

7                   THE COURT: Mr. Radell, ask your  
8                   witness.

9                   MR. KREBS: That shows the  
10                  problems in the document.

11                 MR. RADELL:

12                 Q. Mr. Cooper, do you know where those  
13                 marks came from?

14                 A. I don't know. But I can say I would  
15                 not be at all surprised if it was Karyl  
16                 Schmidt, because Karyl Schmidt reviews all of  
17                 these things. Three people just signed off on  
18                 this document. It's not unusual for me to  
19                 receive documents in a rough form that have  
20                 gone through Karyl Schmidt and have those type  
21                 of markings on it.

22                 Q. When you received your original copy  
23                 of this document, did it have those markings on  
24                 it already?

1 A. Yes, it did.

2 Q. Thank you.

3 THE COURT:

4 Q. The original of the document came to  
5 you, Mr. Cooper?

6 A. Well, it came from files. I don't go  
7 through the files, until I am going to later --  
8 based on referral to me. I don't review every  
9 document until that time, and I go and I get  
10 the compliance file, the Part A file, the Part  
11 B file, the Notification file.

12 At this point, anything to do with this in  
13 the last couple of years would come across my  
14 desk. I wouldn't be surprised if that actually  
15 did come across my desk, but I can't recall if  
16 that letter actually was received by somebody  
17 else.

18 MR. RADELL:

19 Q. What is the purpose -- why does EPA  
20 require groundwater monitoring under RCRA  
21 regulations?

22 A. The objective is to determine whether  
23 the facility is managing hazardous waste, is  
24 releasing hazardous waste in measurable

1 quantities to the groundwater table or the  
2 ground -- below the groundwater table in the  
3 uppermost aquifer.

4 Q. If a facility -- let's see, if a  
5 facility has a liner that prevents such waste  
6 from penetrating into the groundwater -- or let  
7 me rephrase that. Are there any requirements  
8 concerning liners of hazardous waste  
9 facilities?

10 A. There are requirements.

11 MR. KREBS: Can I object -- and  
12 if I'm wrong, counsel can correct me  
13 and I'll stand corrected. I don't  
14 believe there's any allegation  
15 anywhere in the complaint about the  
16 liners required by statutes or  
17 regulations. And if not, I'm  
18 objecting; because I'm not gonna sit  
19 here and allow this case to involve  
20 matters never plead to by waiving an  
21 objection. You know, if I'm wrong,  
22 if that's in the complaint, if  
23 counsel can point out where liners  
24 are discussed, I'll stand corrected.

1 But I don't recall anything about  
2 liners in the complaint filed in this  
3 case, therefore we would object.  
4 It's totally beyond the scope of what  
5 Region V filed in this case.

6 THE COURT: What's the relevance  
7 of this, Mr. Radell?

8 MR. RADELL: The relevance of  
9 this is that as part of the penalty  
10 calculation under the RCRA and Civil  
11 Penalty Policy, the Agency is  
12 required to consider potential for  
13 harm to the environment and also the  
14 regulatory program; but in this case,  
15 the potential for harm to the  
16 environment and since Mr. Cooper was  
17 required to consider the potential  
18 for harm to the environment in his  
19 penalty calculation and since  
20 Mr. Cooper will be testifying as to  
21 how he calculated the penalty and how  
22 he assess those amounts, based on the  
23 RCRA Penalty Policy, this evidence is  
24 relevant to show a potential for harm

1 to the environment, to justify  
2 Mr. Cooper's penalty calculation.

3 THE COURT: Well, isn't this  
4 supposed to be tied to what's been  
5 plead, in the first place? Potential  
6 for harm is one of the various things  
7 alleged, as to what the penalty is to  
8 be. Isn't that so? If this wasn't  
9 part of your allegations, then how  
10 does it fit into things?

11 MR. RADELL: That's what I was  
12 trying to establish. If there -- it  
13 was just to supplement the need for  
14 groundwater monitoring at the  
15 facility, because a liner -- the  
16 sufficiency of a liner directly bears  
17 upon the release of constituents into  
18 the groundwater, and so this would  
19 just drive home the need for  
20 sufficient groundwater monitoring.

21 MR. KREBS: Your Honor, the  
22 question is whether legally the  
23 company has to legally have  
24 groundwater monitoring around.



1           Whether they need it or not, doesn't  
2           make any difference. You either have  
3           to have it or they don't have to have  
4           it. You know, I don't -- you don't  
5           go through the regulations and say  
6           those sites that need it shall have  
7           it; and those that don't need it,  
8           doesn't have to have it. Every RCRA  
9           site has underground monitoring of  
10          water. I mean I don't understand  
11          this need situation. I mean it's a  
12          question of law. It's not a question  
13          of what people want. It's not a  
14          question of policy.

15                 THE COURT: I'll allow it.

16                 MR. RADELL: Thank you.

17                 Q.    Are you aware of any documentation or  
18                 studies concerning the liner at the Gary  
19                 Development facility?

20                 A.    I recall one or two documents  
21                 discussing soil borings and permeabilities of  
22                 the clays that I've seen in file.

23                 Q.    I'm showing the witness a document  
24                 which I have labeled as Complainant's Exhibit

1           Number 13.   (Tendered.)

2           Do you recognize that document?

3           A.    Yes, I do.

4           Q.    Could you identify it?

5           A.    This is a memorandum written by  
6           Mr. Jones of the Geology Section of State Board  
7           of Health, on February 6th, 1986.  Evidently,  
8           it discusses a site visit by at least three  
9           people, including an author.

10          Q.    Well, before you go to describe the  
11          contents, I'd like to move to have this  
12          document admitted into evidence.

13                THE COURT:  What it is being  
14                offered for, Mr. Radell?

15                MR. RADELL:  It is being offered  
16                to show that in calculating the RCRA  
17                penalty for this action, specifically  
18                the penalty concerning groundwater  
19                monitoring requirements, that  
20                Mr. Cooper used this memo and the  
21                information in it as a basis for  
22                calculating the amount of that  
23                penalty.

24                THE COURT:  So, that part of his

1                    calculations were based on the  
2                    contents of this, and this shows what  
3                    that information was?

4                    MR. RADELL: Yes.

5                    THE COURT: Mr. Krebs.

6                    MR. KREBS: Yes, I have a few  
7                    preliminary questions of Mr. Cooper.

8                    V O I R     D I R E     E X A M I N A T I O N

9                    BY MR. KREBS

10                   Q.     Mr. Cooper, do you know Mr. Jones?

11                   A.     No, I don't.

12                   Q.     Do you know whether he has a degree  
13                   in geology or hydrology?

14                   A.     I can't state for certain that he  
15                   does.

16                   Q.     Do you know what school he went to?

17                   A.     No.

18                   Q.     Do you know if he went to Ball State  
19                   University?

20                   A.     I don't know.

21                   Q.     I do; he did. Do you know whether  
22                   his conclusions in here are correct or not or  
23                   whether he made errors?

24                   A.     I assume he recorded his observations

1 accurately.

2 Q. Do you know whether a Judge,  
3 Administrative Law Judge of the Indiana  
4 Department of Environmental Management, on  
5 September 30th, 1986, in a recommended decision  
6 determined that Mr. Jones, didn't know what he  
7 was talking about? Have you ever read the  
8 decision?

9 A. No.

10 Q. Were you aware that contrary to what  
11 Mr. Jones says in this memo -- whoever  
12 Mr. Jones is -- that a Administrative Law Judge  
13 has already ruled in Cause Number 146 at the  
14 Department of Environmental Management, that  
15 the borings done on the west wall at this  
16 facility were done correctly and determined  
17 that the permeabilities were less, 9 to 18  
18 times less than required by the State?

19 A. I'm not aware of that.

20 MR. KREBS: I'm going object to  
21 this document going into evidence.  
22 It's nothing but hearsay. It's  
23 absolutely incorrect. I have here,  
24 Your Honor, in this courtroom a

1 decision of a Hearing Officer which  
2 heard testimony from Mr. Jones. He  
3 exists, he can talk, he can be  
4 called. He was called as a witness  
5 by the State of Indiana in a case  
6 involving Gary Development, N-146.  
7 His testimony was not accepted by the  
8 State of Indiana, specifically by the  
9 appointed Hearing Officer at the  
10 Department of Environmental  
11 Management; and I can prove that, I  
12 have the document here. I have his  
13 testimony, I have his cross-examina-  
14 tion. I have transcripts of this  
15 man's testimony about this issue. It  
16 is inexcusable.

17 And this just shows you the  
18 problem with putting in memos of  
19 people; that when they're  
20 cross-examined, their own Agency  
21 doesn't accept their opinion. And  
22 how am I going to prove that in this  
23 court, if we're just going to put in  
24 document after document of peoples'

1           opinions who are not made available  
2           for trial and that are available.

3           Mr. Jones has been on the site.  
4           He knows how to get up here. He can  
5           be subpoenaed. He's a State  
6           Employee. And when the State tries a  
7           case, they call these people. And I  
8           have the right to cross-examine them.  
9           I'd cross-examine him on this memo;  
10          but I have no way to do that in this  
11          Court, in this Agency. And yet the  
12          State of Indiana, under their  
13          procedure, affords me that right; but  
14          I can't get that right in front of a  
15          Federal Agency, and I don't under-  
16          stand why.

17          THE COURT: Mr. Radell, I'm  
18          going to admit it; but I am somewhat  
19          sympathetic to what I'm hearing. I  
20          assume the defendant would have some  
21          evidence, and examine the witness.

22          MR. KREBS: Thank you, Your  
23          Honor.

24                   D I R E C T   E X A M I N A T I O N

1 BY MR. RADELL

2 Q. Mr. Cooper, does this memo express  
3 concerns about the -- well, could you summarize  
4 the contents of the memo?

5 A. In relation to the soil borings that  
6 were taken, evidently, on this visit, there was  
7 some attempt to make a determination as to  
8 whether the soil borings were adequate; and a  
9 core was taken that was two and a half feet  
10 thick of clay, and the site operator was  
11 claiming that it was six to ten feet thick. I  
12 don't know if that was the precise reason for  
13 going to this site.

14 Q. In general, does the liner under a  
15 facility effect the rate at which leachate may  
16 leak into the groundwater?

17 A. Yes, it does. And in fact in this  
18 case we're talking about the side walls in this  
19 barrow pit, which was dug to remove sand; and  
20 the clay liner was also being put around the  
21 walls to hold water out and to keep the soil --  
22 keep water from moving laterally, as well as  
23 downward. That was the purpose of compacting  
24 clay to the thicknesses that may have been

1           agreed on the N-146. I don't know that that  
2           was what was agreed on in that particular  
3           document.

4           Q.     Is the inadequacy of the liner and  
5           the potential for the leachate to get in to  
6           groundwater the sort of concern that one  
7           considers when evaluating environmental harm,  
8           for the purposes of making calculations under  
9           the RCRA Civil Penalty Policy?

10          A.     It certainly does.

11                     MR. KREBS: I apologize, but I  
12                     couldn't hear counsel's question.

13                     THE COURT: Mr. Radell, say it  
14                     again.

15                     MR. RADELL:

16          Q.     Is the adequacy or the thickness of a  
17           liner under a facility and the resulting  
18           relationship to the rate at which constituents  
19           from the waste in the facility may migrate into  
20           groundwater through that liner, the sort of  
21           thing that one looks at to determine the  
22           magnitude of potential threatening environ-  
23           mental harm, in calculating the penalty under  
24           the RCRA Penalty Policy?



1           A.    Yes, it is.

2           Q.    Okay.

3           A.    It is a factor in concluding the  
4 potential for harm and what will you choose as  
5 a minor monitor, major potential for harm.

6           MR. RADELL:   Okay.   Your Honor,  
7 I would assess that this -- at this  
8 point I'm sort of in a logical -- I  
9 mean, that was sort of one chunk of  
10 testimony; and now we'll be getting  
11 another realm, which is all  
12 inter-related.   So I guess I'm  
13 proposing that we adjourn at this  
14 point; because the other testimony, I  
15 think, would make more sense if heard  
16 in whole, instead of divided between  
17 today and tomorrow.

18          THE COURT:   What is the topic?  
19 For tomorrow is the penalty  
20 calculation testimony?

21          MR. RADELL:   And it will be  
22 evidence concerning the existence of  
23 hazardous waste at the facility.   It  
24 is hither to -- we've discussed

1                   whether or not the facility had  
2                   interim status and the groundwater  
3                   monitoring and financial assurance  
4                   requirements; and now we have -- in  
5                   order to make our case, we have to  
6                   show that the facility actually  
7                   treated and disposed of hazardous  
8                   waste.

9                   THE COURT: That will be all of  
10                  this witness?

11                 MR. RADELL: Yes.

12                 THE COURT: Mr. Krebs, I think  
13                 we are not going to be taking your  
14                 witnesses until later in the morning,  
15                 at best. I propose to start about  
16                 9:00 o'clock tomorrow.

17                 MR. KREBS: As I said, the one  
18                 witness I was not able to get ahold  
19                 of; so he'll probably be here at 9:00  
20                 o'clock. So I guess I'll have to  
21                 deal with that when he arrives. I  
22                 apologize for that, but there was no  
23                 way I could get ahold of him.

24                 MR. RADELL: I would also like

1 to add that had Respondent entered  
2 into stipulations with us, we could  
3 have stipulated to a lot of the  
4 admissibility of this or answer a lot  
5 of their concerns ahead of time, so  
6 that we could be moving along a  
7 little more expeditiously.

8 MR. KREBS: Your Honor, I'm not  
9 required to enter into stipulations.

10 THE COURT: There isn't any rule  
11 that says that he has to stipulate.  
12 One always hopes for stipulations.  
13 Whether or not it's a tactical matter  
14 or whether it's any other kind of  
15 matter, he's under no obligation.  
16 And, my goodness, if I have to come  
17 back to Gary, I will be perfectly  
18 delighted to come back to Gary. One  
19 always hopes one can conclude on the  
20 first trip; but if not, we come back.  
21 So you don't have to worry.

22 Let's conclude for today, being  
23 well past 5:00 o'clock. We'll resume  
24 tomorrow morning at 9:00 o'clock with

1 the testimony of Mr. Cooper and  
2 cross-examination. And with that,  
3 we'll conclude your case.

4 MR. RADELL: Yes.

5 THE COURT: We'll begin the  
6 defense case tomorrow, as soon as  
7 possible. For the record, let's  
8 adjourn.

9 \* \* \* \* \*

10 (Proceedings Recessed at 5:25 P.M.)  
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BEFORE THE ADMINISTRATOR  
U.S. Environmental Protection Agency  
WASHINGTON, D.C.

-----	)	
In the Matter of:	)	
	)	
Gary Development	)	
Company, Incorporated	)	Docket No. RCRA-V-W-86-R-45
	)	
	)	
----- Respondent	)	

J U D G E ' S     C E R T I F I C A T E

I, HONORABLE J. F. GREENE, Administrative Law Judge, U.S. Environmental Protection Agency, Washington, D.C., do hereby certify that the above and foregoing is a true, correct and complete transcript of TRIAL PROCEEDINGS held on the 9th day of September, 1987, in the above-entitled cause of action, including questions, answers and statements made by the parties and Judge at said trial on the designated day, sitting in Superior Court of Lake County, Gary, Indiana.

WITNESS MY HAND this \_\_\_\_\_ day of

\_\_\_\_\_, 1987.

-----  
HONORABLE J. F. GREENE  
ADMINISTRATIVE LAW JUDGE

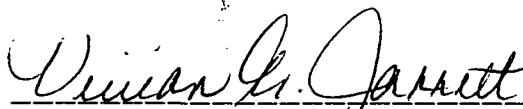
## C E R T I F I C A T E

I, VIVIAN E. JARRETT, CSR, RPR-CP, a Notary Public within said County of Lake, State of Indiana, and a competent and duly qualified court reporter, do hereby certify that the afore-mentioned cause of action came on for TRIAL before the HONORABLE J. F. GREENE, Administrative Law Judge, U. S. Environmental Protection Agency, on the 9th day of September, 1987.

I further certify that I then and there reported in machine shorthand the testimony so given at said time and place, and that the testimony was then reduced to typewriting from my original shorthand notes, and the foregoing typewritten transcript is a true and accurate record of said testimony.

I further certify that I am not related by blood or marriage to any of the parties to said suit, nor am I an employee of any of the parties or of their attorneys or agents, nor am I interested in any way, financially or otherwise, in the outcome of said litigation.

WITNESS MY HAND and SEAL this 4th day of November, 1987.



VIVIAN E. JARRETT, CSR, RPR-CP  
COURT REPORTER & NOTARY PUBLIC

My Commission Expires 12/20/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION V

IN THE MATTER OF:

GARY DEVELOPMENT CO. INC.  
GARY, INDIANA

DOCKET NO. V-W-86-R-045

CERTIFICATE OF SERVICE

I hereby certify that the transcript of the proceedings in the above-referenced case, and this certification have been served as shown below:

Transcript and Certificate mailed Certified mail on December 22, 1987 to:

Honorable Judge Green  
Administrative Law Judge (A-116)  
U.S. Environmental Protection Agency  
401 M. Street, S.W.  
Washington, D.C. 20450

Transcript and Certificate hand delivered on December 22, 1987 to:

Marc H. Randell, Esquire  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
230 South Dearborn Street  
Chicago, Illinois 60604

December 22, 1987

Severely Shorty  
Regional Hearing Clerk